JUSTICE THROUGH SIMPLIFIED LEGAL PROCEDURE

The Annals

VOLUME LXXIII SEPTEMBER, 1917

Editors in Charge of this Volume:
CARL KELSEY, Ph. D.
Professor of Sociology, Wharton School of Finance and Commerce
University of Pennsylvania
and
HENRY W. JESSUP, J. D.
Chairman, Committee of Nine, Phi Delta Phi Club
New York City

THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE
36TH AND WOODLAND AVENUE
PHILADELPHIA
1917

EUROPEAN AGENTS

ENGLAND: P. S. King & Son, Ltd., 2 Great Smith Street, Westminster, London, S. W.
FRANCE: L. Larose, Rue Soufflot, 22, Paris.
GERMANY: Mayer & Müller, 2 Prinz Louis Ferdinandstrasse, Berlin, N. W.
ITALY: Giornale Degli Economisti, via Monte Savello, Palazzo Orsini, Rome.
SPAIN: E. Dossat, 9 Plaza de Santa Ana, Madrid.

CONTENTS

FOREWORD

The forward looking minds of America are giving thought to the changes and developments in our own domestic institutions which must, despite the stress of war times, be controlled and forwarded. One of the first of the topics to which national attention should be called is the simplification of our machinery of justice with a view to its greater efficiency. The period of much talk about judicial reform of a few years ago is now passing into the period of accomplishment. And of plans for re-formation, the Academy believes that the plan herewith presented by the committee of which Mr. Jessup is Chairman, together with the accompanying papers, is well conceived and eminently worthy of thought and of permanent record. The facts as to the committee are given in the footnote on the first page.

This plan and the papers following it are founded on careful study and research and deliberate discussion. The Academy bespeaks from all its readers the thoughtful attention the papers deserve. This is a topic that warrants deliberation and study. In this subject there is no place for a decision based on the hearsay findings of a Committee on Rumor. For as is the machinery of justice so will be the justice meted out to property, to liberty, to life istelf.

Just what parts of our machinery of justice need simplification and why? What changes have been proposed and what adopted? What changes in the constitution are necessary? In practice acts? In laws of evidence? In judicial administration? What *is* wrong with our justiciary machine and what must we do to set it right?

These are the questions the Academy wanted answered in this volume for the guidance and convenience of its members. Messrs. Jessup and Kelsey have done well their tasks as special editors with full responsibility for the volume, and the Academy herewith bespeaks from all its readers the appreciation that is their due.

CLYDE L. KING,
Editor.

THE SIMPLIFICATION OF THE MACHINERY OF JUSTICE WITH A VIEW TO ITS GREATER EFFICIENCY

REPORT TO THE PHI DELTA PHI CLUB OF NEW YORK CITY BY ITS COMMITTEE OF NINE[1]

HENRY W. JESSUP, J.D., Chairman.

In the thirty-fourth of the fifty resolutions written by David Hoffman of the Baltimore Bar, he observed:

> Law is a deep science. Its boundaries like space seem to recede as we advance and though there be as much of certainty in it as in any other science, it is fit we should be modest in our opinions and ever willing to be further instructed. Its acquisition is more than the labor of a life, and after all can be with none the subject of an unshaken confidence.[2]

Burke said in reference to the administration of justice that it was the "highest concern of man on earth."

The American Bar Association in the preamble to its Canons of Ethics has declared:

> In America where the stability of courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public should have absolute confidence in the integrity and impartiality of its administration. . . . . The future of a republic to a great extent depends upon our maintenance of justice pure and unsullied. . . . .

---

[1] This committee was appointed at a meeting of the club held on October 23, 1916, for the purpose of considering what changes in the Constitution, statutes and rules operative in the state of New York are essential to the simplification of practice and greater efficiency in the administration of justice. It followed the activities of a former committee known as the Committee of Seven whose report was the first of those issued by any group of lawyers at the time of the debates on judicial reform preceding the New York Constitutional Convention of 1915, and was submitted to and considered by the Judiciary Committee of that Convention. The members of this committee are as follows: Henry W. Jessup, Chairman, Dean Emery, President, *ex officio*, Harry N. French, Edwin S. Lewis, R. A. Mansfield Hobbs, Willard A. Mitchell, Lawrence S. Coit, Hugh R. Partridge, George W. Alger, Leigh K. Lydecker; and Hon. Norman J. Marsh, advising with the committee. Any person desiring to communicate in regard to the subject matter of the report or in regard to ordering reprints thereof may communicate with the chairman at 55 Liberty Street, New York City. Reprints can also be secured by applying to the American Academy of Political and Social Science, Woodland, Ave. and 36th St., Philadelphia.

[2] David Hoffman, *Course of Legal Study*, 2d ed. 1836, Vol. II, p. 751 *et seq.*

PART ONE—A JUDICIARY ARTICLE FOR THE STATE CONSTITUTION

I THE NEED FOR IDEALISM

The initiation, or promotion, or effectuation of any reform in methods of administering justice is ever the task of those who are able to visualize that which is not yet realized—that is, of men with ideals. And the "practical men" are often impatient of the idealist. And yet, as M. Woolsey Stryker has said, "Idealism is the most practical thing in the world, because tomorrow is at the doors, and we must meet it!" In the words of Charles A. Towne, "There never was any progress without ideals. . . . . Ideals . . . . . are the basis of all ethics . . . . the foundation of all justice. Ideals of right are the fundamental condition of human liberty."

An ancient seer and reformer, the prophet Joel, recognized the dynamic power of ideals, as a means to an end when he said:

> "Your old men shall dream dreams;
> Your young men shall see visions."

II SOME FUNDAMENTALS

Your committee recognized at the outset the magnitude and importance of the task entrusted to it, but entered upon it with the more enthusiasm and sympathetic interest because we realized that similar questions were receiving the earnest and patient study of other associations of lawyers throughout the United States, notably in Illinois, California, Mississippi and Massachusetts. Also the American Judicature Society, organized in July, 1913, had been engaged upon the subject since the time shortly subsequent to the launching of this question of greater legal efficiency in the discussion before the Phi Delta Phi Club of New York, February 17, 1913. This had resulted in a paper on that topic printed in *Bench and Bar*,[3] in March of that year.

In order to comprehend more exactly the subjects of this report, which is presented for discussion and criticism by the American bar and by such of the general public as are interested, it is proper to premise certain fundamental propositions to which, by its action heretofore taken, the Phi Delta Phi Club has committed itself. It seems almost too good to be true that the recall-of-judges heresy

[3] Published in New York City.

has almost passed into the category of forgotten movements. At a luncheon given at the Lawyers' Club of New York to the Chief Justice of Korea early in 1913, the late William B. Hornblower in an address of welcome expressed the hope that the recall-of-judges heresy had not yet invaded the jurisdiction of that Oriental jurist. The Chief Justice, through an interpreter, responded that he had observed that the main objectives of Confucius and of the Founder of the Christian religion were similar, in that both contemplated an ideal state of society in which there should be peace, that is, an absence of disputes between man and man. "And therefore," he wittily concluded, "If you are as consistent in your religion as we are in ours, you are working for and towards a state or condition of society known as peace, in which disputes shall be at an end, *and then there will be an automatic recall of judges and lawyers alike.*" We are concerned with the fundamental fact that "the system for establishing and dispensing justice" is, in the United States of America, by no means uniform. It is articulated into complexly differentiated tribunals and the laws that govern the relations of the citizens of the United States to one another are such that status and the enforcement of rights may differ through the mere fact of residence on one side or the other of an imaginary line that marks a state boundary. And in the particular state to which our attention is called, and with whose Constitution and codes and rules of court we have been for a long time occupied, there has been a condition which can hardly be styled as efficient or expeditious, although by the self-sacrificing efforts of the judiciary of the state and the determination to end what is called "the law's delays," great reforms have already been accomplished when the situation in 1917 is contrasted with the situation, say in 1907. Nevertheless, there still exist anomalies, duplications of effort, unnecessary cogs in the judicial machine creating friction, arresting the prompt and expeditious functioning of the machine, and justifying in the opinion of fair-minded lawyers some of the criticism which the general public is so quick to hurl at lawyers and judges and the so-called "system of justice."

Certain cardinal formulae of efficiency have been promulgated by this organization in the report of its Committee of Seven, to which formulae reference will be made below. The dominant idea was the application to the system of courts of justice of the

"efficiency" principles that have been developed for the guidance of other American business.

III The Need for Efficiency

Treating the system of administering justice as if it were a great machine, it is obvious that if the courts are to be regulated by the same theories of efficiency as any other administrative business or organization, what we desire must be the frictionless movement of a well-lubricated machine in which all the parts coöperate to produce the desired result. "Peace" in its last analysis is frictionless activity, not inaction or idleness, and frictionless activity is an ideal condition of human life; and either term, strange and anomalous as it may seem, is the ultimate desired condition of the administration of justice, in spite of the fact that the administration of justice relates itself to the settlement of contentious disputes.

The literature of efficiency in recent years asserts the claim that "efficiency," which in respect to any particular machine or form of activity is the product of the greatest desired result with the least friction and delay, is like a science capable of being applied to any given form of human activity and is based on certain fundamental or cardinal principles. In the paper on "Legal Efficiency" above referred to the following summary statement was made:

> A number of pamphlets, books, treatises, reports of conferences, have appeared in recent years on the subject of scientific management, or *efficiency*. And it is claimed with great cogency that efficiency is really a science capable of being applied to any given form of human activity and based on certain fundamental or cardinal principles. Mr. Frederick Winslow Taylor emphasizes four, to wit: scientific method; scientific selection of machines; scientific specialization and its development by instruction; scientific coöperation and redistribution of responsibilities. Mr. Harrington Emerson names twelve, to wit: clearly defined ideals; common sense; competent counsel; discipline; fair deal; reliable, immediate, adequate records; dispatch; standards and schedules; standardized conditions; standardized operations; written standard practice instructions; efficiency reward.
>
> With these principles in mind, if we assume that legal efficiency for the purposes of this discussion is ideally possible this side of the Millennial Recall, it can only mean that there shall be the frictionless functioning of all the parts of the great machine of justice wherein the legislature, the courts and the bar shall coöperate in speedy and righteous administration of the law. Such efficiency is a moral duty.

IS THERE CRITICISM?

So long as legislatures grind out laws which are set aside as unconstitutional, or which speedily become dead letters; so long as there spreads through the country a spirit of dissatisfaction with the administration of justice, which has become embodied in this agitation for the recall of judges; so long as the community indulges freely in criticism of the methods and practices of attorneys as dishonest, tricky or dilatory; just so long may we assume that we have not reached the ideally possible stage of legal efficiency, and are warranted in examining the conditions, attempting to formulate some principles the application of which practically might result in an approximation of our ideal. If we superimpose Mr. Taylor's four fundamentals on the twelve principles formulated by Mr. Emerson, and take, as it were, a composite photograph of both, we might find three principles standing out in this composite relief:

(a) Definite ideals standardized into a system in the light of experience and common sense.

(b) Scientific selection of materials and workmen.

(c) The system moving with dispatch and without friction because of coöperation and *redistribution of the strain.*

IV SOME OBSTACLES TO BE MET

It has become a commonplace that litigation connotes delay. The law's delay is popularly supposed to be a *sine qua non* of litigation, and lawyer and judge are, at the bar of public opinion, alike held guilty as the *causa causans* of the condition. So firm and widespread is this conviction that many popular alternatives for the settlement of disputes by courts of justice have been put forward, and some are fully established in operation.

The bar and the legislature, by committees and commissions, have grappled with the problems inherent in the situation, but they have moved slowly—with little unanimity. They have yielded to considerations of political expediency—they have persisted in treating judges as the incumbents of an office carrying emolument, and they resort to medicine to cure or tone up, rather than to surgery to remedy the juridical body.

Your committee has felt, therefore, the need of appealing to the general public. It has dreamed—it sees a vision—it has sought to visualize a new efficiency in the administration of justice, and it offers its ideals for examination, not ignorant of the usual fate of all idealists, but convinced that "tomorrow is at the door," and that the ultimate desired reform must come from the people, guided by the learning and experience, even though restrained by the prejudice and conservatism of the American bar.

V Responsibility of Members of the Bar

Coincidently with this agitation with regard to the law's delays, the clamor for the recall of judges, the contention that courts were exceeding their intended powers when they assumed to set aside as unconstitutional the will of the people expressed in the statutes of its legislatures, the bar of the United States and those of most of the individual states have been successfully active in formulating, promulgating and adopting codes of professional conduct or so-called "canons of ethics," which, little by little, *e.g.*, by amendment of the existing rules for the admission of attorneys, have been made in principle and spirit, binding upon those applying to be admitted to the bar. In the 1917 report of the writer, as chairman of the Committee on Professional Ethics to the American Bar Association, is noted the outstanding fact that the legislature of the state of Washington, by chapter 115, L. 1917, §20, enacted that the canons of that Association "shall be deemed the standard of ethics for the guidance of the members of the bar" of that state. The bench and the bar alike, through committees on professional ethics, committees on discipline or grievances, or committees on the unlawful practice of the law, in various jurisdictions have been seeking to write into the decisions of the various states the general principle that these canons supply a norm of conduct to which decent members of the bar must conform.

This movement has gained such headway and is in such general operation that, as Mr. Elihu Root remarked to the framer of this report, "Sufficient rules of conduct have now been formulated and adopted, and we have reached the period for the application of those rules in professional conduct generally."

Consequently, this committee is of the fundamental opinion, and bases its entire report and such recommendations as it may set forth herein, on the principle, that it is the duty of an educated and conscientious bar to give to the matter of the development of the system of administering justice thoughtful, painstaking and self-denying study and attention, in full realization of the fact that such development must be sympathetic, and must be based upon an intelligent apprehension of what our heritage from the past is and what it means. As an alternative, we must be satisfied to have our system of jurisprudence seized upon and dissected in the laboratory of the doctrinaire, or the "social reformer," often unsympathetic

with the value and influence of precedent, who is willing to sacrifice a system to speed, and the general effectiveness and sureness of a rule of law to the Solomon-like end of doing the right thing between two particular individuals.

Even the President of the United States in addressing the American Bar Association in Washington, in 1914, summed up the popular belief that justice administered in a court is not identical with that which "the innate sense of justice in every human breast conceives to be applicable to a particular dispute."

This paradox has been recognized from the beginning of the development of our law. Doctor John Norton Pomeroy in examining the origin of equity jurisprudence and showing the arbitrariness and formalism of the original five actions that constituted enforcement of civil rights in the earliest period of Roman law, quotes from the Institutes:

"All these actions of the law fell gradually into great discredit, because the over-subtlety of the ancient jurists made the slightest error fatal."

Going on later to emphasize the importance of a correct notion of equity, which he says is not a theoretical but a very practical inquiry, he observes:

"If a certain theory of its nature which now prevails to some extent should become universal, it would destroy all sense of certainty and security which the citizen has, and should have, in respect to the existence and maintenance of his juridical rights."

These observations, we may note, were made in 1881. And this conception to which he refers was known, he says, to the Roman jurists, and was described by the phrase *arbitrium boni viri*, which he translates, "the decision upon the facts and circumstances of a case which would be made by a man of intelligence and high moral principle." He closes by observing:

"It needs no argument to show that if this notion should become universally accepted as the true definition of equity, every decision would be a virtual arbitration, and *all certainty in legal rules and security of legal rights would be lost.*"

Popular opinion, however, remains unconvinced. It wants each individual dispute settled right—and if precedents or rules of evidence intervene, it clamors that they be disregarded or overruled.

This is not a fanciful danger. While we do not for a moment

contend that the social development of the last fifteen or twenty years in the way of tribunals *ad rem* where rules of law are thrown to the winds and where disputes are expeditiously adjusted, is a dangerous development, we do contend, for the purposes of this report, that it is a symptomatic development, that it indicates a trend in public opinion that must be reckoned with in the matter of any permanent and profitable reform in procedure and in the organization of our courts; and it will be seen as this report progresses that we have reckoned with this trend and yet have contemplated that some of the suggestions which are put forward are those which may at the outset commend themselves more immediately to the judgment of the people at large than to that of our brethren of the bar. It was because of our consciousness of these divergences of conviction that we quoted from the Hoffman resolution, and we reprofess our diffidence in promulgating the evolutionary (but, we earnestly urge, not revolutionary) suggestions for the elimination of cogs and for speeding up the juridical machine.

VI Recommendations of the American Judicature Society

The labors of the Constitutional Convention in New York in 1915 came to naught. They were repudiated at the fall elections. The judiciary article fell with the rest, not being separately submitted. But that article fell within the category above noted of "medical" rather than "surgical" remedy. It failed of realizing the philosophical or ideal standard.

It still reckoned with politics and offices, and persons likely to be affected. Little groups here and there were in favor of separate provisions in it, but as a whole it was a mixture and not homogeneously consistent and it commanded no general or enthusiastic support. Great as might have been its value as a step of progress, still it would seem, in the retrospect, as if it would have been merely a side step, a "bypath meadow," a temporarily easier road, but one ultimately to be abandoned, while the great step forward must ultimately be made at the very point of divagation by more drastic, logical and fundamental reorganization. It failed to take into account the full meaning and value of two great movements, to one of which brief allusion has been already made.

There had been growing into an increasing influence a group known as The American Judicature Society, interested in having a

common sense, simple, directly functioning and efficient system of court organization. And alongside this were the activities of the Committee on Uniform State Laws of the American Bar Association, one of the most potent influences for breaking down the complications introduced into the relations of American citizens by the peculiar survival of the theory of the foreignness of each particular state to all of the other states, so that citizens of one state doing business with citizens of another state might in the event of ensuing litigation be confronted with the necessity of conforming to different laws administered under an entirely different procedure.

As to the uniform state laws, the principle of such uniformity, that is as to its desirability in regard to matters in respect of which there never was any substantial defensible reason for diversity, has been recognized and approved by every state of the Union.

In the report of the Committee on Uniform State Laws made to the American Bar Association in 1916, it was said that "the adoption by the various states of uniform state laws which the conference of commissioners has proposed from time to time, has been continuous and increasingly enthusiastic." The committee reports that the Negotiable Instruments Act has been adopted in forty-seven states, the Uniform Warehouse Receipts Act in thirty states, and the Uniform Sales Act in fourteen states. In addition that committee prepared and submitted for adoption uniform acts on divorce, stock transfer, family desertion, probate of foreign wills, marriage evasion, partnership, workmen's compensation and cold storage, and offered with its report of 1916 a uniform land registration act.[4]

The American Judicature Society at the same time had been seeking to frame a model act for the organization of courts, a model practice act and model court rules for the governing of practice, with the laudable idea of making uniform the administration of justice throughout the Union.

The state of New York had, for several reasons, been by way of dominating the practice of other states, perhaps because of the fact that its practice acts were more highly articulated at the time when so many states were considering whether or not to adopt codes. Material was thus afforded for the draftsmen of

[4] See Minutes, American Bar Association, 1916, p. 428 *et seq.*

other states to use in formulating their own codes, merely making differentiations to cover their own peculiar necessities, or assumed requirements. And so, at the time this committee was appointed, and after the failure of the Constitution to be adopted by the people at the election of 1915, the administration of justice in the state of New York was still dominated, controlled and regulated in about as elaborate a manner as it is possible to conceive. It had a Judiciary Article in its Constitution by no means comprehensive because it could not be deemed in and of itself to be all that related to the administration of justice set forth in the Constitution, but, on the other hand, not sufficiently generic, it contained details that ought never to be in a Constitution and restrictions and regulations that, in view of the natural rate of development and evolution in such a community as that of the Empire State, rendered the constitutional regulations inelastic and too rigid in points of detail that ought not to have been included, and subject, in respect to any amendment or change therein, to so much delay and so much machinery and so much missionary expenditure of time and effort to secure any particular change, that it had become a document not adapted to the judicial conditions in popular opinion and in the life of the community.

In the next place, it had a Code of Civil Procedure of no less than 3,384 sections. Many of these were not procedural but substantive; many were hybrid in these two respects, and many more were the subject of numerous amendments by the legislature from time to time. Some of these amendments were the result of painstaking and conscientious effort to improve some particular chapter or title of this code and make it more adaptable to present needs; others were of purely local or private nature, put through the legislature for the purpose of affecting some particular controversy in advance of the day of trial. Some were for the obvious purpose of merely meeting and obviating the effect of some judicial decision based upon the infelicity of particular phraseology. In addition to this, there were rules of practice. There were general rules; then rules made by the Court of Appeals; others by the appellate division of each judicial department; others for the governing of trial terms; others for the governing of special terms, that is, the parts for the trial of causes by a court without a jury, or for the disposition of litigated and unlitigated motions; others

were made by the City Court and others by the Surrogates' Courts. Special rules existed for the county courts and special rules for the municipal courts; with the result that it was not infrequently the case that a member of the bar of New York, admitted to practice in all its courts, would upon being confronted with a case in a court of special or limited jurisdiction, be under the necessity of retaining as counsel, to guide him, one whose practice was more or less exclusively within that court.

The substantive law of the state, starting with the interesting fact that it was the common law except as modified by statute, had developed into a series of volumes of what were called "Consolidated Laws," nearly a dozen in number, and of over 10,000 pages, including amendments and supplements, and two volumes of unconsolidated laws, being a statutory list or record of special, private or local statutes of the state from 1778 to 1911 of about 3,200 pages; mere tabulations of these laws by chapter and year, with a brief statement of the subject and disposition thereof. That this was an intolerable condition everyone had come to realize and a Board of Statutory Consolidation had been created by chapter 713 of the laws of 1913, charged with the duty of simplifying the civil practice in the courts of the state. This board, making a report to the legislature in 1915, summarized the situation as follows:

> When the state constitution was adopted, the people of the state accepted as a part of the law of the new commonwealth the common law procedure of England as the same had been modified by the legislature of the colony of New York, subject to such alterations and additions as the legislature of the new state might from time to time enact with reference thereto.[5]
>
> The dissatisfaction with the condition of the procedure in the courts as well as with the general substantive law was voiced in the provision of the constitution of 1846 which directed the legislature to appoint commissioners to reduce into a written and systematic code so much of the whole body of the law of the state as seemed practicable and expedient to them.[6]
>
> Pursuant to this provision of the constitution the Code of Procedure was adopted in 1848 which made substantial changes in the common law practice and regulated the bulk of the procedure by statutory rules.
>
> The Field code, by which name the Code of Procedure of 1848 was commonly called, sought to regulate only the general features of the practice by statute leaving the courts to control the details by means of rules.
>
> This system together with other statutes bearing upon the subject continued

[5] Constitution 1777, Art. 35.

[6] Constitution 1846, Art. 1, § 17.

to govern the procedure in the courts until the adoption of the first part of the Code of Civil Procedure in 1877 which with the supplemental chapters added in 1880 has regulated the practice in this state down to the present time.

The Throop code, by which name the Code of Civil Procedure has been known, was based upon the idea of bringing together within the covers of a single book all matters relating to procedure whether substantive or otherwise and regulating all of the details of practice by statutory enactments.

The criticisms that were made against the Code of Civil Procedure at the time of its adoption have been fully justified by experience; and ever since its enactment, speeches, addresses and reports have been hurled against it.

The agitation on the subject resulted in the passage of an act in 1895 providing for the appointment of commissioners to report "in what respects the civil procedure in the courts of this state can be revised, condensed and simplified."[7]

The final report in pursuance of this statute was submitted to the legislature five years later but opposition arose to the plan followed by the commissioners and the report failed of adoption.

In 1899 a report of the Committee on Law Reform of the State Bar Association was made, in which the committee recommended "a simple practice act containing the more important provisions of the present code rearranged and revised, supplemented by rules of court."

A joint committee of the legislature in 1900 recommended a general plan, one of the features of which was "to reduce the general practice provisions to a single brief legislative practice act."

In 1903 a committee called the Committee of Fifteen made a report to the legislature pursuant to chapter 594 of the laws of 1902 in which it made various recommendations which would give as the report states: "A statute covering practice only, supplemented by such rules as may be deemed necessary to carry out fully its provisions."

In 1903 the Committee on the Law's Delay made its report with reference to the condition of procedure in the first department and made certain recommendations which however were not adopted.[8]

BOARD OF STATUTORY CONSOLIDATION

At this time the Board of Statutory Consolidation was created by chapter 664 of the laws of 1904 by which it was authorized not only to consolidate the general statutes of the state but to revise the practice in the courts.

The board found the task of simplifying the practice too great a one in conjunction with the work of consolidating the statutes and therefore directed its attention to the latter.

In 1909 the board presented a consolidation of the general substantive statutes of the state which were adopted that year and later it prepared a statutory record of these statutes and also a statutory record of the special, private and local statutes.

The simplification of the practice, however, had not been overlooked by the

[7] L. 1895, ch. 1036.

[8] L. 1902, ch. 485, amended by L. 1903, ch. 634.

board and in 1906 there was prepared a reclassification of the provisions of the Code of Civil Procedure under a logical analysis following the steps in the progress of an action.

In 1912 by chapter 393 the legislature directed the board to examine and report a plan for the classification, consolidation and simplification of the civil practice in the courts of this state and in the following year this report was presented to the legislature.

In 1913 the board was directed to prepare and present to the legislature "a practice act, rules of court and short forms" as recommended by the board in its report to the legislature of 1913.[9]

In accordance with that statute we report to the legislature of 1915 statutes and rules designed to carry out the directions of the legislature and to simplify the practice in the courts of the state.

VII General Principles of Reform

This report on simplification had been submitted to and discussed by the bar associations of the state of New York through able committees. It has been before the public at public hearings of the Joint Legislative Committee having this report under advisement for the legislature of the state. And it has been carefully examined by this committee with the primary result that a conviction has been formed in their minds that in the nature of things there are two theories of reform. One may be called the patchwork theory, and has high authority in support of it. It consists of emendations, "here a little, there a little, line upon line, line upon line, precept upon precept, precept upon precept," with the result that the modification or change that is sought is distributed over a period of time. The fact that drastic changes will result is concealed from a suspicious public, apprehensive that in some way their liberties or pockets will be unfavorably affected by any reform advocated by lawyers alone.

The other theory of reform is that urged by those who are conscious of the historic value of all developing institutions, but nevertheless have the courage, for it involves courage, to attack this particular problem of reform on the same theory on which the founders of this republic attacked the task of drafting a Constitution and of organizing the courts of the United States and, from time to time, of the several states of the Union. This method, postulates the ideal as its goal, the ideal in a constitutional Judiciary Article and the ideal in the distribution of powers of subsequent

[9] L. 1913, ch. 713.

regulation between the courts and the legislature. Confronted with both ridicule and abuse those who pursue this method must focus their attention undividedly upon the logical consistency of any plan which they put forward. To any limited group, such as this committee frankly concedes itself to be, both in its access to the general mind of the community and by reason of its own predispositions or prejudices, that which may seem logically consistent may nevertheless, when scrutinized by those of wider experience and learning, reveal defects not obvious to the framers. It is for the particular purpose of having such defects revealed that this report is given publicity and presented as an attempt to frame and formulate a concise and generic scheme of legal and judicial efficiency, adaptable to the evolution of the community and its needs and yet sufficiently rigid to preserve from impairment those things which are vital and necessary to the durability of the judicial system.

It will not surprise students of jurisprudence that certain questions emerge in this report which, so far as the state of New York is concerned, may be supposed to have been settled beyond the hope of change. Such, for example, is the reëmergence of the question of an appointive judiciary, with the interesting but vital modification that the appointing power should be, not in a legislature, nor in a governor, but in a chief justice of the state, who himself should be elected by the people, so that the three departments of the people's power, legislative, executive and judicial, should *all have their roots in the popular will, should all be accountable to the people;* but each should be so organized and in particular the judicial power, as to be independent of legislative and executive control, except in certain well-defined respects adequately indicated in the discussion below.

Another feature which emerges in this report, and which it is hoped will lead to immediate intelligent discussion, is that of a general court of plenary jurisdiction, having all the powers and attributes of all the existing courts in the state of New York, but divisible, by its own act, into as many parts or divisions as the exigencies of judicial business may from time to time require, such as an appellate division of last resort, intermediate appellate divisions, probate divisions, divorce divisions, commercial law divisions, tort divisions, criminal parts or divisions, and those in

turn divided into parts dealing with felonies, others dealing with misdemeanors and minor offenses, but all presided over by a judiciary, any member of which has the full plenary power of the court to determine and dispose of causes coming within the jurisdiction of the part over which he is presiding, so that no longer can one enter a court of justice asserting a right or complaining of a wrong and find himself, perhaps after months or years of delay, ejected and informed that he should have applied to some other division of the judicial system of the state and have pursued his remedy in another forum.

Opposition will surely develop to any suggested reform that is comprehensive and drastic, that involves a reforming of the old judicial machine, an elimination of long-familiar cogs that distributed power and wasted it, so that there may be direct transmission of power and as little intervening machinery as possible. Such reforms always arouse opposition. The abolition of a code cannot but lead many lawyers to suppose that, if there is to be repealed all that they know, they will have at an advanced age to learn practice *de novo*, and that their earning capacity will be diminished. In spite of the education and intelligence of the bar as a body, their objection to this particular reform is precisely similar in principle to that of the workmen in England to the introduction in mills and factories of labor-saving machinery, resulting in strikes and disorders, which only, however, in the end reacted upon those who were not able to see that certain things must come.

Also, as to the elimination of courts as separate institutions, having specific and limited powers, differentiating them from other courts, and at the same time preventing them from doing adequate and ample justice in cases which have by reason of special features warranted their assuming jurisdiction, these special courts have advocates and devotees who deprecate as a personal matter any consolidation of them in a court of general plenary jurisdiction. Moreover, the judges of higher courts with which these lesser courts would necessarily be homologated under such a reform cannot resist a feeling of opposition based upon the apparent equality which the judges of these inferior courts would at the outset have in respect of power and jurisdiction (we do not even suggest of salary), and are reluctant to share their dignity with those who were not primarily chosen with a view to their serving as justices of a court

of general jurisdiction. Thus the opposition to any such drastic reform comes from above and from below.

Again, any suggestion of reform must also take into account not only the activities of bar associations and groups of lawyers, students of jurisprudence and men determined to secure the ideal in the administration of the law, but also the opinion and conviction of the man in the street, or the average citizen from whose ranks come the litigants and jurors in the courts of justice of the land. Many members of the community are brought into touch with the administration of justice as jurors, witnesses, litigants, spectators, readers of the public press. Among them, if we may properly judge from current literature, there has grown up an impatience with the operation and application of certain principles of the law, substantive and adjective, including the law of evidence which is betwixt and between; so that it is not unusual to hear a man assert with an air of finality that the object of legal forms and procedural statutes and rules of evidence is to prevent rather than to effectuate justice. Some of these objections and misapprehensions on the part of witnesses, jurors and litigants are amusingly portrayed in a recent publication by a justice of the Municipal Court of New York City.[10]

There is a rule in force in most of the states that one shall not testify to transactions with or communications from or to one since deceased, upon the obvious theory that the person with whom the acts or communications were had cannot contradict them, and the result is that in many probate cases, especially in accountings, it is impossible to ascertain the facts, because of the operation of this rule known as Section 829 of the Code of Civil Procedure, in the state of New York. A case was recently tried where the attorneys were so occupied with the ebullitions of their respective clients attempting to interrupt and contradict one another that neither of them thought to interpose any objections under this section, with the result that the testimony of the witnesses duly sworn, and received by the referee with the determined purpose to ascertain the facts if possible, resulted in all the facts being fully testified to, and when *the facts were all testified to*, a settlement of the controversy resulted in about ten minutes, and the determination of the referee was made upon consent. Whereas, had it not been for the eliciting of this testimony,

[10] *The Man in Court* by Frederick DeWitt Wells, C. P. Putnam's Sons, 1917.

which could have been prevented by objection from either side, the facts out of which the settlement necessarily and expeditiously resulted would not have been known to the adversaries nor to the referee presiding. And so, to many a layman it would appear that a judge might very well be empowered to comment on testimony of this sort, to receive it with the distinct limitation that the question for the jury, if there was a jury, was one of the credibility of the witness testifying on the apparently safe assumption that he could not be contradicted, and permitting the judge to comment on the credibility of the testimony in his charge to the jury, just as he would comment in forming his personal judgment upon evidence if he himself had tried the case without a jury. For to swear a witness to "tell the truth, the whole truth and nothing but the truth," and then to prevent him from disclosing to the court the very thing, communication or saying that is determinative of the conduct which is the matter of scrutiny in the particular litigation, seems unfair and preposterous to the ordinary man.

So it is in regard to the rule against hearsay testimony. The man in the street forms his judgment in regard to his every-day affairs, his investments, the enlargement or contraction of his business, his judgment as to the relationship to him of partners, customers, competitors, and so on, on hearsay testimony, and yet when he is in a jury box and sworn to do justice between two adversaries, and to decide the case upon the facts thereof, he finds himself excluded from finding out how it was that one party or the other came to act as he did, although it is a matter of general human cognizance that men act upon what they hear just as much as upon what they observe or feel. So in respect to the rule of hearsay evidence, it is not unlikely that we might find the exceptions to that rule being emphasized, and the rule itself being limited by some such device as was suggested in the rule against testifying to transactions or communications with a decedent.

There is another feature connected with the dissatisfaction with the delay of the courts in disposing of matters committed to their arbitrament, and that is the erection of various bodies by the people having quasi-judicial powers and intended to accelerate determination of matters requiring speedy and authoritative determination, so that commissions of various sorts have been erected. These commissions determine rights and award and deny privileges,

all upon the same kind of testimony that affects the man in the street in making his own daily determinations. In the case of the workmen's compensation boards the people have chosen to enact that their findings of fact shall be conclusive when the propriety of their action is reviewed in the courts, and it is a well-known fact that these workmen's compensation boards, or commissions, brush aside all technicalities of the rules of evidence and try to get at the facts that they want to know. Assuming the validity of the plan of taking the money of an employer regardless of his negligence or the degree of care which he has exercised over those whom he employs, to pay one who, by his own careless or reckless conduct may have invited the disaster, it is nevertheless true that the public has welcomed and approved this rough-and-ready method of getting at the facts and ending a controversy in a minimum of time.

VIII The Significance of Public Opinion

We have therefore to take into consideration, not only the efforts made all over the land to simplify the procedure in the courts and to shorten the time within which a litigant may have his controversy adjudicated and disposed of, but also the efforts of the American Judicature Society to get the bar of the whole country interested in uniformity of court organization and of practice in the court. Not only have we the tendency to press the suggestion that codes be abolished as far as possible in favor of a very concise short practice act, and that the regulation of judicial business be left to the courts so that they may adapt themselves to changing conditions in the simplest and most natural way; but also we have the movement spreading all over the country, aligning the bar on platforms of high ethical standards which bind them not only in their relations to clients and to the courts in which they plead their clients' causes, but in all respects in which they discharge their duties as citizens in the communities in which they live and move and have their being.

There is also the movement just hinted at spreading over the various states of the Union to establish "quick-lunch" tribunals, or boards, or commissions, which do not need to be enumerated. The workmen's compensation commissions, already adverted to, are a sufficient illustration. They are based on a principle which in the higher sense is socialistic; they postulate a liability to pay on the

part of the employer, irrespective of the negligence or fault of his employes. They drive rough-shod over the rules of evidence for the purpose of ascertaining the facts, and in most cases the facts as found by these tribunals are deemed conclusive upon the courts of review.

But it may be well to call attention to one other example. A milestone in the history of such development in New York is marked by the promulgation of the system of "arbitration and conciliation," and the rules for carrying it out adopted in the municipal courts of the city of New York under Section 8 of the *New York Municipal Court Code*, published in the month of April, 1917, providing for an agreement to arbitrate before a justice of the court or any other person. This agreement, after the first hearing, is made binding on the parties. The arbitrator is required to proceed to hear the controversy, and we quote this significant phrase from Rule 3:

> He shall not be bound by the rules of evidence, but may receive such evidence as it may seem to him is equitable and proper. Either party may be represented by counsel, but no record of the proceeding before the arbitrator shall be kept, and no expense shall be incurred by him in the proceeding except upon the consent in writing of both parties.

This scheme of arbitration is promulgated contemporaneously with one for conciliation, by which a person may proffer a note of conciliation with regard to any claim which in his opinion may be adjusted without resort to an action at law. And in respect to these notes of conciliation and the hearings before the justice, which are informal, under Rule 4 the following phrases are significant:

> The justice hearing the case shall endeavor to effect an amicable and equitable adjustment between the parties . . . . *he shall not be bound by the rules of evidence, but may receive such evidence as seems to him equitable.*

These phrases embody what seem to your committee the most significant development in the public attitude toward the administration of justice, namely, that the public is growing impatient of the application of these time-honored rules for ascertaining facts in courts of justice. The man in the street reaches his conclusions, forms his judgments, conducts his life, in the great majority of instances, on evidence, the value of which depends entirely on the credibility in his opinion of the person who communicates the particular fact or statement to him. If the man in the street were,

by some mysterious law, precluded from receiving information except according to the rules obtaining in courts of justice, and of governing his conduct accordingly, life would be intolerable.

In the interesting and amusing book called *The Man in Court*, above noted, the writer remarks apropos of the attitude of an ordinary jury:

> During the trial a feeling of resentment of court procedure grows. It is not the judge any longer who is keeping and delaying them. The witnesses appear like fools, it is true, but the lawyers make them act more foolishly than need be. Why does the judge make such absurd rulings? The law must be an unreasonable thing and the judge evidently knows a great deal about it. *Why can't the witnesses tell what they know?* . . . . The strange part is that when a witness has said something and told how he or she feels about the case, *which is exactly what the jury want to know*, one of the lawyers jumps up and says he moves to strike that part all out, and the judge strikes it out.

It is obvious, therefore, that the investigation of this situation of the administration of justice cannot be fairly or profitably accomplished unless those who have the task in hand keep constantly in mind the popular view and even the popular prejudice with regard to the development of an ideal method of ascertaining the facts in regard to a dispute between litigants in courts of justice.

This problem of increasing the efficiency of our courts presents itself as a problem of loyalty, and warrants an appeal to the public as well as to the profession.

Mr. Elihu Root, in making his presidential address to the American Bar Association in 1916, commented upon the extraordinary increase in national efficiency as one of the most striking effects of the great war in Europe. And after pointing out with prophetic clearness that a similar development must take place in the United States he commented upon the great economic waste in the administration of law, the unnecessary expenditure of wealth and effective working power in effecting this particular function of organized society. After a humorous suggestion that a very considerable percentage of the 114,000 lawyers in the United States, as shown by the census of 1910, could well be spared to do the work on the farms of the country, he declares that the underlying cause of the defective administration of justice is,

> that the bar and the people of the country generally proceed upon a false assumption as to their true relation to judicial proceedings. Unconsciously, we all treat

the business of administering justice as something to be done for private benefit, *instead of treating it primarily as something to be done for the public service.*

He points out that, even with so large a leaven in our legislatures of men who are members of the bar, there is

a continual pressure in the direction of promoting individual rights, privileges and opportunities, and very little pressure to maintain the community's rights against the individual, and to insist upon the individual's duties to the community.

He adds,

There are, indeed, two groups of men who consider the interests of the community. They are the teachers in the principal law schools and the judges on the bench. With loyalty and sincere devotion they defend the public right to effective service, but against them is continually pressing the tendency of the bar and the legislatures, and, in a great degree, of the people, towards the exclusively individual view.

After commenting on some defects in the administration of justice under the procedural law as it stands, he observes:

A large part of the detailed and specific legislative provisions regulating practice is really designed to enable law business to be carried on without calling for exercise of discretion on the part of the court, and the evil results of the absurdly technical procedure which obtains in many states really come from intolerance of judicial control over the business of the courts.

And we quote with especial emphasis the following as justifying the general trend of our recommendations:

A clearer recognition of the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own procedure would tend greatly to make the administration of justice more prompt, inexpensive and effective. And this recognition must come from the bar itself.

IX CONSTITUTIONAL CHANGES

We address ourselves first to the root of the whole matter, namely, to the inquiry to what extent, and in what particulars, ought the Constitution of a state to deal with the administration of justice? What safeguards are essential, keeping in mind the American idea of the threefold functions of government by the people, legislative, executive and judicial? Are any of the present formulae outworn? Or, on the other hand, has experience shown the supe-

rior value of the once-discarded over the experiments of former readjustments?

And if the constitutional provisions are to be purely generic and not specific, then to what extent is that which is specific, but still demands formulation, to be formulated by the legislature, or to be left to the courts themselves?

The American Judicature Society issued in March, 1917, a second draft of a state-wide judicature act, known as Bulletin 7–A, the original bulletin being out of print. In the introductory note the draftsmen of this act commented on the fact that before such an act could become law in any state some revision of the Judiciary article of the local constitution would probably be necessary. This would be particularly true in such a state as New York. Certain measures of reform that have been suggested in that state have been met by the criticism of unconstitutionality. This was after an examination extending over a long period of time by a commission called the Commission on the Law's Delays, by the framing of statutes to carry out the recommendations of that commission and by the actual passage of such statutes. They were vetoed on that ground as contravening the scheme of administration of justice embodied in the constitution of the state. Notably was this the case with regard to speeding up the judicial machine by eliminating the burden laid upon judges of considering procedural and interlocutory matters through the intermediation of masters, appointed somewhat on the English plan. All such proceedings were to be sifted out by them and nothing left to be tried by the courts but issues of fact or of law. This particular measure was vetoed by Governor Odell on the report of the Attorney-General that it would deprive justices of the Supreme Court of powers which were vested in them by the Constitution. Singularly enough, it has developed, upon search, that this opinion is not on file.

Moreover, in the state of New York, certain courts have become known as "constitutional courts," having been either organized pursuant to some constitutional provision or having been recognized in the constitution as existing courts with a jurisdiction to be preserved unchanged, unless in some cases they were capable of being modified by legislative action, in respect of which express permission for action was reserved in the Constitution itself.

Our first task, therefore, and the task of greatest importance is

to suggest to the bar and to the people of the state, by means of a model Judiciary Article, the three fundamental principles of a complete reform:

(a) A uniform court;

(b) With administrative and disciplinary machinery inherent within that court; and

(c) Provision for reducing the volume of business and rendering the course of justice more expeditious and sure. We propose, therefore, the following Judiciary Article, each section being printed in bold face type and the discussion following immediately after each section as the text of our report.

Section 1.—Judicial Power; Re-constitution of courts.—The judicial power of this State shall be vested in the Court of the State of New York. In this Court the People may sue, and without further consent, be sued. Nevertheless, the legislature may provide for a court for the trial of impeachments and for the election and appointment of justices of the peace.

This conception of a unified court is not novel.[11] The state of New York has an elaborate articulation of judicial tribunals. The Supreme Court is a court of general jurisdiction. It holds special and trial terms. It had a criminal branch formerly known as the Oyer and Terminer but now superseded by the "Criminal Part" of the court. It has appellate terms composed of three justices, wherever that term exists, who hear appeals from certain inferior courts. It has an appellate division in each of the four judicial departments where several judges sit in banc and hear appeals from the Supreme Court and from the appellate term in certain cases, and from Surrogates' and County Courts. There is a court of last resort known as the Court of Appeals, which is itself by the Constitution a court of limited jurisdiction, and much of the agitation with regard to judicial reform has arisen by reason of the limitation of the right of appeal to this court of last resort.[12]

There are local courts known as City Courts in various parts of the state. With certain exceptions, there is a County Court in each county. There is a Surrogate Court in each county, although in certain counties the same judicial officer discharges the judicial

[11] See reference in Part II, p. 61, to English Judicature Acts.

[12] See Chapter 290, Laws of 1917.

duties of County Judge and of Surrogate. There are various criminal courts, courts of Special Sessions, General Sessions, Magistrates' Courts. Then there are, in some of the cities, Municipal Courts. Each of these various courts or divisions of courts has its special rules and practice, and such of the courts as are of special jurisdiction may be so closely limited, that when a cause has been finally reached for trial and is to be passed upon, it may develop that the court is without power to grant the relief desired and the litigant be refused relief or remitted to another forum perhaps after the statutory limitation has run against his claim. At the same time the courts of general jurisdiction are protected against the consideration of pecuniarily "small" matters that ought to be tried in the lesser courts. This is accomplished by provisions mulcting the litigant with costs if he improperly engage the attention of that court with the settlement of his petty dispute.

This idea of a uniform court, promulgated by the American Judicature Society, has also been urged by the National Economic League of Boston, the Phi Delta Phi Club of New York City, the so-called "Lawyers' Group for the Study of Professional Problems," in New York City, and as long ago as 1909 was recommended by a special committee of the American Bar Association. The proposition is to abolish all the existing differentiated courts of various jurisdictions and to vest the judicial power of the people in a Court of the State, into which all these existing tribunals shall be consolidated and taken up, with power, as below noted, to divisionalize itself and set up as many parts of first instance or of appeal, and if necessary, of intermediate and of final appeal, as may from time to time be convenient and necessary. These various parts are always to be subject to the control and order of the court itself, so that whenever a litigant having a claim shall bring another into court they shall find themselves in a tribunal adequate to adjust finally and once for all, their mutual rights, and to grant the remedy adequate for the determination of the controversy.

From the theoretical point of view, there obviously should be no maintainable opposition against this suggestion. The recommendation of the American Judicature Society represents a consensus of opinion from all over the United States of members of the bar and of students of the law who have given the matter the most mature consideration. The real objections, the rock upon

which the reform may strike and founder, are local, personal and selfish. It appears to strike at and abolish existing positions carrying emolument or salary, and therefore it is imperative to state at the outset that it need not necessarily do so. Assuming that there are two hundred judicial officers in a given state enjoying different grades of salary as judges of the different courts now existing in that state, it is obvious that such a constitutional reform (adopted by the people and consolidating them all into one court, to be known by a new name or by an existing name of a historic court), can take up into the activities of that court at the outset every existing judicial officer for the term for which he may have been elected, and at the salary payable to him at the time of this evolutionary change. On the other hand, there is an objection on the part of the existing judges of what may be called the higher courts. They now have a differentiation of dignity wholly independent of their larger salaries, which puts them on a plane above and apart from the judges, say, of a municipal or purely local court, and assuming the change to be effected, the various judges will be put upon a plane of judicial equality in that each will be the judge of a general court having power to grant relief and to hear disputes equal to that of every other judge of that court, save and except as the court itself by the machinery below suggested may assign different members of that court to duties in divisional parts. The jurisdiction of these parts may be determined from time to time by the rules of court rather than by a constitution or by a short practice act.

The answer to this objection is that this very fact will result in raising the standard for the selection of judges, whether by election or by appointment, to a common norm and the period of time for which any incumbents in office may still have to serve at the time the change goes through may be disregarded as negligible in view of the larger results to be ultimately achieved. Assume for the moment that a judge of the municipal court is by reason of the adoption of such a Judiciary Article by the people of the state made equal in glory to the judge of the court of last resort. At the same time the differentiation of functions may be preserved by the assignment of the one to a division of last appeal and the assignment of the other to a division of dispossess cases or cases involving no more than a given pecuniary amount.

It is proper to say that this committee takes issue here and

now with the proposition that there ought to be a poor man's court, in the sense in which that proposition is usually urged. Every tribunal of justice ought to be a poor man's court, that is to say, it should not be intended for any particular class of the community. The equality of justice is not subserved by remitting one man to a tribunal presided over by judges differentiated in honor and in respect and emolument from judges whose services are better paid, who are invested with greater jurisdiction and dignity and who are made available only for persons having controversies involving pecuniary amounts that the poor man cannot expect to control. The only differentiation that is consonant with the theory upon which courts of justice should be administered is one which is related to the expedition of business, so that causes which may be described as "short causes," causes which may be categorized under some generic classification, and are capable of being disposed of with a minimum of research and demand upon the time of either counsel or court, may be tried in such tribunals as may properly be erected as divisional parts of the court of the state, *i.e.*, causes not requiring the patient research and analysis, which, for example, a long accounting, or similar litigations may require. Nevertheless, if people were to be satisfied that a uniform court were desirable and would result in the better and more speedy administration of justice, the question of relative dignity or compensation of present incumbents of judicial office would have to be disregarded and not allowed to stand in the way of so great a step forward.

> **Section 2.—Existing courts abolished.—All the existing courts, both of record and not of record, are abolished from and after the last day of December, one thousand nine hundred eighteen.**
>
> **All their jurisdiction shall thereupon be vested in the Court of the State of New York, and all actions and proceedings then pending in such courts shall be transferred to the Court of the State of New York for hearing and determination.**

This section requires no amplification. It is the corollary of Section 1. It provides for eliminating any possible delay or prejudice to any litigants actually involved in suits or proceedings pending at the time of the change.

However, it is an interesting fact that this experiment of consolidation has already been tried in the state of New York with

the most satisfactory results, and that too over almost precisely the same objections as are put forward in discussing this general problem of a unified court. We refer to the change wrought by the Constitution of 1894 in consolidating into the Supreme Court the Superior Court and the Court of Common Pleas. Both of these courts existed and had high and honorable traditions, but they were courts of special and limited jurisdiction, and it had developed that there were cases, even with the powers that those courts possessed, where justice could not be effectually and completely secured by reason of the limitations on the power of the courts and of their judges in the cases coming before them. These courts were thus abolished or taken up into the Supreme Court and the existing judges became judges of the Supreme Court, remaining in office for the terms for which they had been elected or appointed, and their salaries were even made to conform to those of the other justices of the Supreme Court residing in the same counties. The judges affected by this change became some of the most efficient members of the Supreme Court bench and established reputations for learning and industry and efficient dispatch of justice not a whit below that of their associates on the Supreme Court bench. The experiment is, therefore, not a new one, and inconveniences and objections are negligible in view of the advantages in efficiency which this one experience and experiment justify us in believing would necessarily ensue.

Section 3.—Divisions of the Court of the State of New York.—The Court of the State of New York shall be organized into divisions, to include always a division of final appeal, and such divisions of intermediate appeal and divisions of first instance as may from time to time be necessary.

The divisionalizing of this court is required by the exigencies of judicial business. Such business has heretofore been dealt with by the legislature as requiring the erection of separate tribunals with special and limited jurisdiction; but the overlapping of jurisdictions, or the conflict of jurisdictions, or mistaken entry into one jurisdiction when the remedy desired could only be secured in another, have in great measure been responsible for the complaints against the administration of justice by disappointed or unsatisfied litigants. Under the divisionalization of a court each part of which had full power to grant adequate relief, no litigant having run his

course could be thrown out upon the very day of trial on the ground that he was in the wrong court. If under the rules a case should be properly disposed of by a judge assigned to a particular division, and had been reached before a judge in another division, it could be transferred without loss of time or other advantage and be forthwith disposed of.

The discussion under this particular section will turn entirely upon the propriety of providing in the Judiciary Article itself that there should always be a division of final appeal and divisions of intermediate appeal, on the one hand, and the general proposition that there should be such divisions of appeal, whether final or intermediate, as the court might from time to time by its order prescribe. It is not vital to this discussion that the question shall be disposed of at this time. The bar and the litigants of any particular state may differ as to whether a party has a right to more than one appeal, or if they agree that every litigant is entitled to one appeal whether that appeal shall be in all cases to the court of last resort. But it is proper to note that the scheme obtaining in the state of New York for what are called appellate divisions of the Supreme Court (to which appeals except in capital cases must go, and which shall serve as a sort of clearing house for appellate business, so that certain cases can never pass that court, whereas other cases may go up as a matter of right or as a matter of permission) is a scheme not generally obtaining throughout the United States and has resulted in certain cases in the complaint that, in the uncertainty as to whether a case was going to the court of last resort, a particular appellate division might not deal with the case in the same manner and with the same degree of care that they would have dealt with it, had it been certain that the case could go no further.[12] With this criticism of the appellate judiciary, in so far as it involves a charge of carelessness, your committee is not in sympathy and does not endorse the complaint, although it recognizes its existence. The point is that until the adjudication embodied in a judgment or final order of the particular appellate division is rendered, it may not develop

[12] The finality of the determinations of the appellate division and the consequent relief of the Court of Appeals have been emphasized by legislation enacted during the current year which, however, it is not necessary to discuss at length. It is remedial legislation, not curative. It does not strike at the "tap root" of the difficulty and complaint.

whether the case is to be affirmed or reversed and if reversed whether it is reversed on the law or on the facts, or on both, and the questions that emerge in regard to the right of appeal to the Court of Appeals have become involved in minute refinements of judicial decision. Special books have been written dealing exclusively with this question of appeals, and the whole matter is involved in technicalities beyond the grasp of the ordinary practitioner.

Suffice it to say that the scheme of intermediate appellate divisions and the limitation of appeals therefrom in certain cases was a device put forward in the constitutional convention of 1894 for the purpose of relieving the pressure on the Court of Appeals which was behind its calendar, and has been continued ever since. The arguments in favor of it are that it has resulted in the erection of tribunals of intermediate appellate jurisdiction of the highest dignity, ability and industry; nearly two hundred volumes of reports of their decisions have been handed down since the erection of these courts, each of these volumes running from 700 to 800 pages. But in certain cases the determination of these appellate divisions, on similar questions, have been conflicting, and there has been no assured method of resolving these conflicts of decision in cases where the particular litigant lacked the inclination or money or right to go to the Court of Appeals. On the other hand the contention of many is that there should be an enlarged Court of Appeals; and the objection to such a court is immediately made that when there have been "second divisions" of this court, or "commissions of appeals" set up, sitting concurrently to relieve it from an overcrowded calendar, there was the same possibility of conflicting decisions, and this possibility was an insuperable objection to the scheme of an enlarged court.

In answer to this contention it may very properly be urged that if there were but one court of last resort and no courts of intermediate appeal, and that court of last resort consisted of twenty-five or thirty members, then that court should sit in banc, by a majority, on all questions involving the life of citizens or questions of constitutional law, but that other appeals should be classified and categorized and should be heard before divisional parts of that court, consisting of seven or nine judges, three or more of whom should sit concurrently. There would be no conflicting determinations, and in any case that might seem to involve a possible conflict

of determination between one of these divisional parts and another, the rules of the court might prescribe that such divergencies in the two cases where the conflict developed should be submitted on the record to the court sitting in banc for its determination, and before the decision was published. To have one court of last resort sitting in parts, and they sitting coincidently, would multiply the output of determinations by that court directly in the ratio that the number of such parts bears to the present single session of a court of last resort. It would eliminate the necessity of the intermediate appeals; it would shorten the time within which the litigant could reach his final determination and it would lessen the cost to the litigant in professional fees and in the cost of preparing records for the two successive appellate tribunals.

But whether there be a court of last resort and intermediate appellate tribunals or only one Court of Appeals, the practical suggestion is that *that shall be a matter for the general court itself to determine.* It should, therefore, be vested with permissive power to divisionalize itself in the matter of appeals as in other matters as from time to time the exigencies of judicial business might require. The matter ought not to be foreclosed by the Constitution itself, nor ought it to be left to the legislature to determine by statutes or amendments thereto made from time to time, perhaps at the instance of parties having a particular axe to grind and a particular litigation which they desire either to end or to carry still further.

In the English Judicature Act there is provision made under which the "Court of Appeal" may sit in divisions and under which

> for all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction and the amendment, execution and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the Court of Appeal shall have all the power, authority and jurisdiction by this act vested in the High Court of Justice.

It was also provided that,

> Every appeal to the Court of Appeal shall, where the subject-matter is a final order, decree, or judgment, be heard before not less than three judges of the said court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two judges of the said court sitting together.

And if any doubt arises as to what decrees, orders or judgments are final and what are interlocutory, the question is determined by the Court of Appeals as a body.

We simply cite these provisions of the English organization in order to show that our suggestions are not unheard of, nor unworkable.

Section 4.—Judicial departments.—The present four judicial departments of this State are continued, but the legislature may alter from time to time the boundaries thereof, except that the first judicial department shall always consist of the counties of New York and of the Bronx, and the others shall be bounded by county lines, and be compact and equal in population as nearly as possible. The present number of judicial departments shall not be increased.

There shall not be more than one division of intermediate appeal in each judicial department.

This section requires no amplification.

Section 5.—Chief justice and justices.—The Court of the State of New York shall consist of one chief justice and of as many justices as there are justices and judges in the existing courts of records, hereby abolished.

The chief justice shall be elected by the people of this State for a term of ———— years, and may be re-elected for one or more terms. Should the office become vacant during any term, the governor shall fill it by appointment for the remainder of the term.

The justices shall be appointed by the chief justice, subject to confirmation by the Board of Assignment and Control.

No person shall be elected chief justice nor appointed justice who has not been a member in good standing of the bar of this State for at least ten years.

The justices shall serve during good behavior or until they shall have attained the age of seventy years; but any justice who shall have served continuously for fifteen years and shall have attained the age of sixty-five years may apply to the Board of Assignment and Control to be retired, and, upon that Board certifying that the reasons assigned by him are sufficient, he shall be so retired.

The salaries of the chief justice and of the justices and of the official staff and of the members of the Committee of Discipline who are not justices shall be regulated by the legislature, but no salary of any justice shall be diminished during his term of office.

A justice, whose term of office shall after fifteen years of service cease by reason of age or retirement, shall receive an annual compensation equal to two-thirds of the salary he received during the last year of his term.

The Board of Assignment and Control may certify that the number of justices shall be reduced, and thereafter no vacancy shall be filled until the number shall be reduced accordingly. The number of justices shall not be increased except by the legislature upon application of the Board of Assignment and Control.

It is obvious that this section presents, in the state of New York at least, the most controversial point in this whole report. At the time of the Constitution of 1846 the state departed from the appointive and resorted to the elective judiciary system. And from the standpoint of the individual, local electors, the idea is abhorrent to them that they are not competent to select proper and efficient judges of their own causes. And today, as in the days when Rufus Choate made his memorable address to the Massachusetts Constitutional Convention of 1850, when the action of the people of the state of New York was still fresh in the memories of men, it is still true that the most insidious and yet unfair answer to the argument for an appointive judiciary is: Will you not trust the people? As he remarked in his address:

> That is a very cunning question, very cunning indeed. Answer it as you will, they think they have you. If you answer yes, that you are afraid to trust the people, then they cry out, "He blasphemeth." If you answer no, you are not afraid to trust them, then they reply, "Why not permit them to choose their judges?"

He undertook to solve the dilemma by what he characterized as "a safe general proposition":

> If the nature of the office be such, the qualifications which it demands, and the stage on which they are to be displayed be such, that the people can judge of those qualifications as well as their agents; and if, still farther, the nature of the office be such that the tremendous ordeal of a severely contested popular election will not in any degree do it injury,—will not deter learned men, if the office needs learning, from aspiring to it; will not tend to make the successful candidate a respector of persons, if the office requires that he should not be; will not tend to weaken the confidence and trust, and affectionate admiration of the community towards him, if the office requires that such be the sentiments with which he should be regarded,—then the people should choose by direct election. If, on the other hand, from the kind of qualifications demanded, and the place

where their display is to be made, an agent of the people, chosen by them for that purpose, can judge of the qualifications better than they can; or if from its nature it demands learning, and the terrors of a party canvass drive learning from the field; or if it demands impartiality and general confidence, and the successful candidate of a party is less likely to possess either,—then the indirect appointment by the people, that is, appointment by their agent, is wisest.

This statement was prefaced by that great advocate with a discussion of what constitutes the best judge, the good judge, the judge whom the people of the state should desire to put and maintain upon the bench. And because this oration is a milestone in the discussion of this subject and is hard for the average reader to find, we quote these classic passages:

In the first place, he should be profoundly learned in all the learning of the law, and he must know how to use that learning. Will anyone stand up here to deny this? In this day, boastful, glorious for its advancing, popular, professional, scientific, and all education, will any one disgrace himself by doubting the necessity of deep and continued studies, and various and thorough attainments, to the bench? He is to know, not merely the law which you make, and the legislature makes, not constitutional and statute law alone, but that other, ampler, that boundless jurisprudence, the common law, which the successive generations of the State have silently built up; that old code of freedom which we brought with us in the *Mayflower* and *Arabella*, but which in the progress of centuries we have ameliorated and enriched, and adapted wisely to the necessities of a busy, prosperous, and wealthy community,—that he must know. And where to find it? In volumes which you must count by hundreds, by thousands; filling libraries; exacting long labors,—the labors of a life-time, abstracted from business, from politics; but assisted by taking part in an active judicial administration; such labors as produced the wisdom and won the fame of Parsons and Marshall, and Kent and Story, and Holt and Mansfield. If your system of appointment and tenure does not present a motive, a help for such labors and such learning; if it discourages, if it disparages them, in so far it is a failure.

In the next place, he must be a man, not merely upright, not merely honest and well-intentioned,—this of course,—but a man who will not respect persons in judgment. And does not every one here agree to this also? Dismissing, for a moment, all theories about the mode of appointing him, or the time for which he shall hold office, I am sure, we all demand, that as far as human virtue, assisted by the best contrivances of human wisdom, can attain to it, he shall not respect persons in judgment. He shall know nothing about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his friend; nothing for his patron; nothing for his sovereign. If on one side is the executive power and the legislature and the people,—the sources of his honors, the givers of his daily bread,—and on the other an individual nameless and odious, his eye is to see neither, great nor small; attending only to the "trepidations of the balance." If a law is passed by a unanimous legislature, clamored for by the

general voice of the public, and a cause is before him on it, in which the whole community is on one side and an individual nameless or odious on the other, and he believes it to be against the Constitution, he must so declare it,—or there is no judge. If Athens comes there to demand that the cup of hemlock be put to the lips of the wisest of men; and he believes that he has not *corrupted the youth, nor omitted to worship the gods of the city, nor introduced new divinities of his own,* he must deliver him, although the thunder light on his unterrified brow.

This, Sir, expresses, by very general illustration, what I mean when I say I would have him no respecter of persons in judgment. How we are to find, and to keep such an one; by what motives; by what helps; whether by popular and frequent election, or by executive designation, and permanence dependent on good conduct in office alone—we are hereafter to inquire; but that we must have him,—that his price is above rubies—that he is necessary, if justice, if security, if right are necessary for man, all of you, from the East to West, are, I am sure, unanimous.

And, finally, he must possess the perfect confidence of the community, that he bear not the sword in vain. To be honest, to be no respecter of persons, is not yet enough. He must be believed such. I should be glad so far to indulge an old-fashioned and cherished professional sentiment as to say, that I would have something of the venerable and illustrious attach to his character and function, in the judgment and feelings of the commonwealth. But if this should be thought a little above, or behind the time, I do not fear that I subject myself to the ridicule of any one, when I claim that he be a man towards whom the love and trust and affectionate admiration of the people should flow; not a man perching for a winter and a summer in our court-houses, and then gone forever; but one to whose benevolent face, and bland and dignified manners, and firm administration of the whole learning of the law, we become accustomed; whom our eyes anxiously, not in vain, explore when we enter the temple of justice; towards whom our attachment and trust grow even with the growth of his own eminent reputation. I would have him one who might look back from the venerable last years of Mansfield, or Marshall, and recall such testimonies as these to the great and good Judge:

"The young men saw me, and hid themselves; and the aged arose and stood up.

"The princes refrained talking, and laid their hand upon their mouth.

"When the ear heard me, then it blessed me, and when the eye saw me, it gave witness to me.

"Because I delivered the poor that cried, and the fatherless, and him that had none to help him.

"The blessing of him that was ready to perish came upon me, and I caused the widow's heart to sing for joy.

"I put on righteousness and it clothed me. My judgment was as a robe and a diadem. I was eyes to the blind, and feet was I to the lame.

"I was a father to the poor, and the cause which I knew not, I searched out.

"And I brake the jaws of the wicked, and plucked the spoil out of his teeth."

Give to the community such a judge, and I care little who makes the rest of the Constitution, or what party administers it. It will be a free government, I

know. Let us repose, secure, under the shade of a learned, impartial and trusted magistracy, and we need no more.

And now, what system of promotion to office and what tenure of office is surest to produce such a judge? Is it executive appointment during good behavior, with liability, however, to be impeached for good cause, and to be removed by address of the legislature? or is it election by the people, or appointment by the executive for a limited term of years?

The Chief Justice, elected by the people, is their "agent," in the meaning of Mr. Choate's great argument, no less than is the chief executive of the state.

At the same time Rufus Choate called the attention of that Convention to the discussions in *The Federalist*[14] in which the pur-

[14] "That 'there is not liberty, if the power of judging be not separated from the legislative and executive powers.' It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that, as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coördinate branches; that, as nothing can contribute so much to its firmness and independence as *permanency in office*, this quality may therefore be justly regarded as an indispensable ingredient in its Constitution; and, in a great measure, as the *Citadel* of the public justice and the public security.

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

"Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal, that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional

pose of an independent judiciary is vindicated, and appointment during good behavior as the means of such independence is vindicated also, and he had recourse to observations which strike at the root of the dissatisfaction popularly entertained of such acts of the

---

judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

"This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction be reconciled to each other, reason and law conspire to dictate that this should be done. Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will should have the preference.

"But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate

judiciary as for the moment arrest and interfere with the will of the people, as expressed by their legislatures from time to time, by virtue of that interpretative power vested in the judiciary of determining whether a given statute runs counter to the Constitution of the state or of the United States. Mr. Choate observed:

> Sir, it is quite a striking reminiscence, that this very paper of *The Federalist*, which thus maintains the independence of the judiciary, is among the earliest, perhaps the earliest, enunciation and vindication, in this country, of that great truth, that in the American politics, the written Constitution—which is the record of the popular will—is above the law which is the will of the legislature merely; that if the two are in conflict, the law must yield and the Constitution must rule; and that to determine whether such a conflict exists, and if so, to pronounce the law invalid, is, from the nature of the judicial office, the plain duty of the judge. In that paper this fundamental proposition of our system was first presented, or first elaborately presented, to the American mind; its solidity and its value were established by unanswerable reasoning; and the conclusion that a bench, which was charged with a trust so vast and so delicate, should be as independent as the lot of humanity would admit—of the legislature, of the executive, of the temporary popular majority, whose will it might be required thus to subject to the higher will of the Constitution, was deduced by a moral demonstration. Beware, Sir, lest truths so indissolubly connected—presented together, at first:—adopted together—should die together. Consider whether, when the judge ceases to be independent, the Constitution will not cease to be supreme. If the Constitution does not maintain the judge against the legislature, and the executive, will the judge maintain the Constitution against the legislature and the executive?

---

the converse of that rule as proper to be followed. They teach us, that the prior act of a superior, ought to be preferred to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

"It can be of no weight to say, that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

"If then the courts of justice are to be considered as the bulwarks of a limited Constitution, against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judgments, which must be essential to the faithful performance of so arduous a duty."—*The Federalist*, number LXXVIII, New York, June, 1788.

What the working of this principle in the national government has been, practically, there is no need to remind you. Recall the series of names, the dead and living, who have illustrated that bench; advert to the prolonged terms of service of which the country has had the enjoyment; trace the growth of the national jurisprudence; compare it with any other production of American mind or liberty; then trace the progress and tendencies of political opinions, and say if it has not given us stability and security, and yet left our liberties unabridged. . . . .

It will be recalled that Montesquieu, in emphasizing the necessity for a separateness between the executive, legislative and judicial branches or functions of government, nevertheless allowed that in the British Constitution, which was his great model, there were certain features which might be described as "coöperation in certain rights" between the various separate branches of authority.

In *The Federalist* Alexander Hamilton interpreted the proposition laid down by Montesquieu as amounting to no more than this, "That where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free Constitution are subverted." And he points out in the Constitutions of the different states, that New Hampshire's, which was the last to be framed, recognized "the impossibility and inexpediency of avoiding any mixture whatever of these departments"; and qualified the doctrine by declaring that "The legislative, executive and judicial powers ought to be kept as separate from and independent of each other as the nature of free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of unity and amity." On the other hand, he points out that the Constitution of Massachusetts declares, "That the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative or judicial, or either of them: the judicial shall never exercise the legislative or executive, or either of them."

The Constitution of New York, however, at that time contained no declaration on the subject but gave nevertheless to the executive a partial control over the legislative, "and what is more, gives a like control to the judicial department and even blends the executive and judiciary departments in the exercise of this control." So that in respect to certain appointments the members of the legislative are associated with the executive authority in the appointment of both

executive and judiciary officers. And its court for the trial of impeachments and corrections of error is to consist of one branch of the legislature and the principals of the judiciary department.

Upon re-reading Section 5 above, in the light of the foregoing, your committee hopes that the idea will at once strike the reader that the suggestion here made that the chief justice of a state, the primary judicial officer of the Court of the State, being elected by the people for the primary purpose of appointing the judiciary of the state from time to time, will harmonize the difficulties that at one time emerged through the dedication of the power of appointment to the executive; and at the same time preserve to the people the fundamental right, inherent in our system of government, of dominating the judicial branch of our government by the right of election at its source, and yet preserve the independence of the judiciary by not making them subject to the occasionally arbitrary will of the executive or to the influence of political considerations or emergencies, thus removing once for all partisanship from the serious matter of selection of judicial candidates, in short, of insuring the selection of that type of judges visualized by Mr. Choate in his incomparable vision.

We have given careful consideration to the proposal submitted in 1916 by the New York Short Ballot Organization to the legislature of that state. It suggests nominations to the people by the Governor, four weeks before the time closes for nominating judges. The purpose is to create "a judiciary that is ordinarily appointive (in effect) but with the appointments subject to challenge, and to confirmation or rejection by the people."

The proposal comments on the fact that in the Constitutional Convention of 1915 the fight for a return to the appointive system was lost. But the people rejected the work of the Convention *in toto*, so that no such deduction is fair. But every argument leading up to the recommendation of a change in the method of selecting judges applies in favor of our recommendation. We quote only one paragraph to prove this. If you read "Chief Justice" for "Governor" this is shown by Paragraph III, which reads:

> III A more responsible method of nomination will give to the people better control over the judiciary than they now possess, inasmuch as it is far easier for the people to get the kind of Governor [read: chief justice] they want and thereby automatically secure the corresponding kind of judges than it is for them to have

to stand guard over their interests in every separate judicial contest amid the confusion of political campaigns. This constitutes in brief our answer to those who allege that we are trying to take away from the people the choosing of judges, a statement based on the superficial assumption that to have an officer *elected* by the people is equivalent to having that officer *chosen* by the people. There are still many who deceive themselves by failing to see that in a given case the appointive way may be more democratic than the elective way, and it was, of course, this instinctive, unreasoning opposition to cutting out the unworkable sections of the elective list that made the whole Short Ballot movement necessary. Democracy does not mean having the people *elect* everybody, it means having the people *control* everybody.

What are the practical features of the subject contained in this section?

The election of the chief justice by the people.

In relation to this it may be said that the highest and best result could be achieved if that were a separate election, held in the spring of the year on the expiries of the terms of office. The election of such an officer would engage the attention and interest of the bar to a degree never before realized and the bar would exercise its influence and its ability to choose in a manner not at present possible.

No one could hope to secure the nomination to so important an office who was not, equally with the Governor of the state, a man of outstanding reputation and learning, and, additionally, of standing at the bar. While the duties of his office would be selective and administrative, rather than judicial, under the structural scheme elaborated in these recommendations, nevertheless the position would be the highest attainable by a member of the bar of the state, in dignity, in influence and importance.

No man, however great his practice or income, could afford to disregard the summons of his brethren of the bar that he should place himself at the head of this great coördinate branch of the government of the state. And so high should be the office in dignity, emolument and influence, that the man of petty disposition, the man purely partisan, the schemer, the politician, the practitioner upon whose career any blot of suspicion or distrust may have rested, could not successfully aspire to or attain it.

It is idle argument to say that to create a chief justice with powers of appointment so far-reaching would be to throw the judiciary into politics. It begs the whole question. If the President of the United States can be trusted to appoint the judiciary of the fed-

eral bench, presumably the Chief Justice of the United States could be similarly trusted, and yet we know that the executives of the nation and of the several states have often made appointments for particularly personal reasons, and the temptation and the risks of yielding to such temptation would be far greater when exercised by one not committed to a particular career, but still engaged in his progress toward further and perhaps higher political honors and desirous of welding together a support and adherence that will facilitate his further progress. The chief justiceship of the state would represent the summation of a career, the highest and best gift of the profession, and by the simple device of permitting the chief justice to continue as an officer of the court or of retiring full of honors, ability, any lawyer or judge, though garbed in the cloak of poverty, might still covet and enjoy so high a position.

It must be borne in mind that Section 5 provides that the appointments, by the chief justice, are to be "subject to confirmation by the Board of Assignment and Control."

On the other hand, it is obvious at the outset, that if such a change were to be effected, the first chief justice of a given state would only enjoy this right to appointment in the case of individual judges of the various courts consolidated into the court of the state as their several terms of office to which they may previously have been elected should fall in by expiration, or by death; that is to say, the power would be, from the very beginning, a limited one and would involve the selection of persons qualified to succeed to the outgoing or deceased judge in the particular tasks to which he may have been assigned, and the duties which he was discharging. Surely a chief justice would be more competent to make more proper selections in the ordinary course than a governor, regardless of the fact that such chief justice as well as the Governor, might be from time to time the exclusive choice of a party rather than of the people of the whole state. The fact remains, and it ought to be recognized, that in a matter of such importance the bar of the state as a rule would have little difficulty in selecting the man to whom, above all others, such a gift as the nomination to this office, ought to be proffered.

It may as well be noted in this connection under the subdivision as to serving during good behavior, that it is the theory of this unified court that it shall be self-disciplinary.

We recognize the judge to be a public officer and as a public officer he should be subject to impeachment in the name of the people, *in the same manner as any other public officer.* It is proper that there should be a court for the trial of such impeachments but it ought to have its place in that part of the Constitution or statutes of the state which relates to public officers, and not in a Judiciary Article. *The court for the trial of impeachments is not a court of justice; it is a tribunal of the people.* The considerations that move the manifold constituents of that tribunal are usually political. It is only in cases of the utmost scandal, where the patience of the public has been exhausted by the acts of a corrupt and venal judge, that the determinations of such tribunal may be characterized as just and impartial. In many cases the determinations of such tribunals are unsatisfactory, even where they result in driving from the bench one against whom charges have been preferred. The power to remove from its body an unfit judge for good and sufficient reason, and upon hearing duly had, ought to be vested in the court itself, and we refer accordingly to Section 10 below dealing with the subject of discipline of members of the bench and of the bar alike by a board or committee of the court, having jurisdiction exclusively of questions of that character. Apart from such cases, judges should serve during good behavior, and in order that the career of a judge may be a career, he ought to be able to look forward, at the expiration of his service, when he is full of years, to a continuation in part, at least, of the support upon which he has had to rely and not be required to reënter the practice of the law, rendered precarious by his age, although in many cases it might be rendered profitable by his experience gained upon the bench. In the state of New York the device of official referees is a recognition of the value and importance of the pension system, although adopted in the face of an outstanding prejudice against any such pension system.

Once the initial step has been taken, the number of judges being at that moment determined by the experience of the people up to that time, and all the existing judges taken up by the process of consolidation into the new court of the state, they will be grouped by the Board of Assignment and Control to the discharge of the various divisional duties which the court itself may have determined to be necessary, differentiating these parts according to their jurisdiction and function and assigning the existing judges to the con-

tinued performance of those duties they have immediately been discharging. As these judges die, or their then terms of office expire, the court by the same Board may determine that successors need not be selected, thus reducing the number of judges if the amount of business does not require their continuance. But it is provided by the last clause of the section that the number of judges shall not be increased, except at the direction of the people, expressed through the legislative will.

It will be noted, finally, in this connection, that the term of office of the chief justice of the state can be made short. Two considerations lead to this recommendation: First, the office is intended to appeal to the leader of the bar for the time being, a man necessarily in most cases advanced in years, and upon whom the burden of his office should not be too long laid; in the second place, it recognizes the idea of accountability to the people and that they thereby will be afforded an opportunity in respect of their control of the judiciary branch of their government, to call, through the chief justice, the administration of justice to account at stated intervals by voicing anew their choice of the one through whom that control is exercised.

Section 6.—Annual convention and special meetings of the justices.—The justices shall convene annually in January to elect the Committee of Discipline, a presiding justice of the section of appeal and presiding justices of the divisions of intermediate appeal, if any be organized in the several judicial departments, and to determine any matters relative to the Court of the State of New York that it is within their province to determine. They will also elect one justice from each judicial department to serve on the Board of Assignment and Control.

The Board of Assignment and Control may at any time call special meetings either of all the justices or of the justices of any judicial department.

Section 7.—Removal or impeachment of justices.—Justices may be removed by the Board of Assignment and Control upon the certificate of the Committee of Discipline, specifying the unfitness or unworthiness of the justice requiring such removal and certifying the record of the hearing of the charges against him.

Justices may also be impeached in the same manner as any other public officer.

This section recognizes the fact that a judge is a public officer. And his impeachment ought to be on the same basis as the impeachment of any other public officer and therefore a court for the trial of impeachments, if such court is to have power to try any public officer, should have power to try all public officers, and it should not therefore be a tribunal written into the judiciary article, but into the article dealing with public officers. In the very nature of things such a court is not a court, it is a tribunal. It is an unwieldy body. It has powers and limitations which are not general to courts as such. It involves a machinery and makes claims upon the time and service of men whose primary service is to do something else, which circumstance alone is enough to account for the generally unsatisfactory course of its proceedings and the nature of its arbitraments.

Section 8.—Masters.—The Board of Assignment and Control shall have power to direct the appointment of masters to dispose of procedural, interlocutory or supplementary matters, with such powers and for such terms of office as it shall by general rule prescribe, and it may determine the number of masters in the several judicial departments.

The chief justice shall appoint, subject to confirmation by the Board of Assignment and Control, as masters, members of the bar in good standing who shall reside in the judicial department in which they are appointed and who shall have been admitted for at least seven years.

The legislature may prescribe the salaries of the masters, which may vary in the several judicial departments, but, in the absence of action by the legislature, the salaries of the masters may be prescribed and varied by the local fiscal municipal boards in the several counties, upon certificate of the Board of Assignment and Control.

It may appear in studying this proposed section that it diverges from the fundamental rule for the framing of a judiciary article that it shall be generic and not deal with details. This report, however, deals primarily with the jurisprudence of the state of New York. And in that state it has been determined by executive authority, acting on the advice of an attorney-general, that this particular method of speeding up the judicial machine is unconstitutional. Your committee is so convinced of the value and importance of this particular method of expediting justice and of relieving the strain upon judicial officers, that we have inserted it among the sections of

a judiciary article although differing from the opinion of the attorney-general above referred to and believing that the same result could be achieved by legislative enactment, *e.g.*, in a Short Practice Act. The only reason for inserting it in a judiciary article is that these officers must be paid, that their salaries will be a county or state charge and that the fact must not be disguised that from this body of officers, selected in the manner described in this proposed judiciary article, there will develop material available for selection from time to time to fill vacancies in the body of the judiciary itself. Irrespective, however, of these considerations, it is essential that the nature of this reform should be carefully set forth, and we can do so no better than by quoting from an English authority secured by Mr. Choate when he was Ambassador to the Court of St. James, for the purpose of aiding the Commission on the Law's Delay, at that time appointed by the legislature for the purpose of considering methods of reform. This commission had analyzed the state of litigation in New York and it had gotten together a mass of statistics, which later and in another form was summarized by Mr. Charles A. Boston in a paper in which he demonstrated that of the bulk of our judicial decisions more than 50 per cent thereof were concerned with matters of procedural and interlocutory detail.[15] In the discussion on legal efficiency above referred to, it was urged that if judges could be confined to the determination of issues and deal with the rights of parties, while all interlocutory and preliminary matters were to be urged and adjudicated before these masters by means of the "summons for direction" and "summons for judgment," as used in England, the greatest step forward in the simplification and expedition of practice would be achieved. Briefly summarized, this system pours into the test tube of "issue joined" the quick solvent of prompt omnibus interlocutory relief and pre-

[15] At the request of the American Bar Association, Mr. Frank C. Smith made an examination of the general digests for the first quarter of 1910 to determine what proportion of the reported cases related to matters of procedure. His report shows that more than one-half of all the points ruled on during that period of time by the state and federal courts of the United States related to matters of practice and procedure, and less than one-half of the points to matters of substantive law. The table which he prepared was printed in the Docket for March, 1917, and showed a total of 5,927 cases, in which 22,986 points were presented for adjudication, 12,259 of which were points on practice, *i.e.*, adjective law, or 53.32 per cent which, by comparison, he figured to be an increase of 5.07 per cent.

cipitates at once the "bad faith defendant" or the "hold up plaintiff" and leaves the pure crystals of definite, specific, *bona fide* issues, with which the court has to deal.

The preliminary work up to the threshold of the trial is conducted by an efficient staff of Masters. They must be members of the bar, or solicitors, of over ten years' standing. The position is one of importance and dignity and is highly prized. From the time a writ is returnable until issue is finally joined, the Masters deal with the proceedings, and it is impossible to overrate the efficiency, celerity and usefulness of their work. If a defendant fails to enter an appearance the plaintiff may take his judgment before a Master. If the plaintiff is suing for a liquidated sum, for a tradesman's bill, for instance, or upon a promissory note, or even for the rent of premises, or the possession of land, he may endorse upon his writ the nature and amount of his demand. Immediately upon the entry of appearance by the defendant, which must be within eight days, the plaintiff may take out a *summons for judgment*, which is returnable in four days. This summons is heard by a Master and immediately disposed of, the evidence being confined to a brief affidavit by the plaintiff that the money sued for is due and payable and that the defendant has no defense to the action, and the affidavit of the defendant stating his defense. If the Master is of opinion that the defendant's affidavit does not disclose a meritorious or substantial cause of defense he at once gives judgment for the plaintiff. If he is of opinion that the defendant has some answer to the plaintiff's demand three or four courses are open to him: (a) he may, if the parties consent, try the case himself, in which event the hearing will be without pleadings, and upon oral evidence, in the Master's private room; or (b) he may, whether the parties consent or not, put the case in the "Short Cause List," to be heard, probably during the ensuing week, by a judge in open court, and in this case also, without pleadings and upon oral evidence; or (c) he may give leave to defend upon the condition that the defendant forthwith pay the sum in dispute into court, or unconditionally, and in such case the action will take its usual course.

It will thus be seen that in every instance where a plaintiff is suing upon demand of this nature (and in every country the bulk of litigation must be of this character) *final judgment may be obtained within from two weeks to a month from the date of the service of the writ.*

In all other actions on contract, and in tort, the plaintiff is compelled before taking any step in the action, other than an application for an injunction, or for a receiver, or the entering of judgment in default of defense, to take out a "*summons for directions.*" This is returnable within four days and is heard by one of the Masters, who has power thereon to direct whether or not there shall be pleadings, and the place and mode of trial, and also whether there shall be "particulars," admissions, discovery, interrogatories, inspection of documents and commission for the examination of witnesses. All of these things are open to the application of either party and are granted or refused in the discretion of the Master. If he directs pleadings he may at any time subsequently, if he is of opinion that such pleadings do not sufficiently state what the respective parties' contention will be at the trial, order that particulars be given of any averment. For example, if an agreement is alleged he will order that its date be given, and whether it was oral

of in writing, and if it is oral who it is alleged it was made between, and if in writing that the document be identified.

The Master has also power to order each party to make a list of all documents in his possession which are material to any question in issue in the action, and to permit his opponent to inspect and take copies of such documents. This disclosure is technically known as "discovery of documents," and undoubtedly tends to save expense and shorten litigation. The Master may, furthermore, order either party to answer on oath before the trial certain questions submitted by his opponent, upon the terms that if the party to whom the interrogatories are addressed is the plaintiff, the action be stayed until he answers them, or, if defendant, that, in default of answering, his defense be struck out.

Finally the Master has power upon the application of either party to strike out the whole or any part of a pleading which he deems irrelevant, or he may give leave to enter judgment if the defendant by his defense admits the statement of claim.

The proceedings before the Master are of the simplest kind. He sits behind an office table in his room, and the solicitors or counsel who appear to support or oppose summons, stand before him and argue their points in a conversational tone. In this business-like way he gets through twenty or thirty cases in the course of a day, and although his decisions may involve summary judgments for thousands of pounds, his orders are made while the parties are before him, being endorsed upon the summons itself. There is an appeal from him to a judge who sits in Chambers to hear such appeals, but in the great majority of cases the decision of the Master is final.

It is hard to add anything to the definiteness of this description. It must be frankly stated that one of the addresses made before the New York State Bar Association in Brooklyn in 1917 pointed out certain respects in which the system in England was not working to complete satisfaction. But in the metropolitan districts of the state at least, where the congestion of business is the most notable, the permission to appoint and use such Masters is, in the judgment of your committee, essential to a scheme of reform, and it ought not to fail of being made available by any sin of omission on our part.

Section 9.—The Board of Assignment and Control.—The administrative business of the Court of the State of New York shall be conducted by the Board of Assignment and Control composed of the chief justice, the presiding justice of the section of appeal and of one justice from each judicial department elected annually. Every power adequate to that end is hereby conferred upon it.

It shall promulgate rules for conducting the judicial business of the Court of the State of New York, and may prescribe common forms for use therein. In the absence of action by the

legislature it may prescribe rules of evidence. It shall from time to time define the number and jurisdiction in civil or criminal matters of the several divisions of the Court of the State of New York and prescribe the parts and terms thereof, and assign justices to service therein.

It shall act without delay upon all appointments of justices and of masters made by the chief justice under Sections 5 and 8 hereof.

It shall provide for the appointment of the official staff of the Court of the State of New York, except that each justice may, subject to its approval, appoint his own private secretary and confidential attendant.

It shall prescribe requirements of character and attainments for admission to the bar, including the oath of office, and shall admit those applicants who shall comply therewith.

It shall certify annually to the legislature such judgments against the people of this State as may require an appropriation.

The chief justice shall be the chairman of the Board of Assignment and Control.

By this section the great judiciary system of a state is made self-administering. The people control the purse strings, the local supervisors or a board of estimate and apportionment together with the legislature control the budget and can limit extravagance, but in the matter of making the court machinery efficient and to that end having the power to control and regulate the conduct of every unit in the working force, the judiciary system is put upon a business basis. The only question is whether or not civil service rules ought not to yield to the operation of such an administrative system, for in a matter where the rights of a community are involved, the right of a man to a job under some hard and fast civil service regulation ought to yield to the public convenience. The head of the police force, for example, dismissing a subordinate for disobedience or inattention to duty, ought not to be compelled on a writ of *certiorari* to reinstate such insubordinate subordinate, for both discipline and efficiency are thereby very seriously impaired. It ought not to be impossible to adjust the operation of a reasonable civil service system to the efficiency of a court which, after all, in its ultimate analysis, is an agency of the community for the administration of justice, and not merely a forum or amphitheatre for the settlement of personal disputes.

Section 10.—Committee of Discipline.—The justices shall elect annually a Committee of Discipline composed of five justices and of two members of the bar who shall have been admitted for at least fifteen years.

The Committee of Discipline shall maintain discipline among the justices, the masters, the official staff and the members of the bar, and, for that purpose, shall have power, after due hearing, to censure, either privately or publicly, fine or suspend any master or any member of the official staff or of the bar, to remove any master or any member of the official staff, to disbar any member of the bar, and to recommend to the Board of Assignment and Control the removal of any justice.

The chief justice shall be ex officio a member of the Committee of Discipline, and shall be its chairman.

Here again we have the same feature in its more specific aspect. The judicial body corporate is given the power to purge itself of unfit and unworthy membership. The advantage of a self-disciplining machinery over the unwieldy and dilatory process of a trial before a court for the trial of impeachments lies in the fact that in the majority of cases of a judge against whom it was charged that he was unfit, for whatever reason, to continue to administer justice in the community, he might be prevailed upon by the Committee of Discipline, except in the most flagrant case, where the disciplinary proceedings should take their full course, to resign and to avoid the scandal incident to the prosecution of a public officer for conduct unworthy of his office. It might be said, on the one hand, that no plan should be supported that would enable such scandals to be hushed up, and that it is a great object lesson to the community when any representative body of its citizens rebukes and eliminates from its membership one who has been guilty of unworthy conduct. On the other hand it may be asserted that one such experience is sufficient as an object lesson in any one generation. But the object lesson loses its entire value and validity if it results in the particular complaint being resolved into a political contest and into an alignment of votes on the question of unfitness, conditioned, not by the facts of the case, but on partisan or other political considerations.

In the second place, it should be noted that this Committee on Discipline is to consist not only of justices of the court, but of members of the bar and is to have power to deal with members of the bar who are accused of unprofessional conduct. As a matter of

interest to readers outside of the state of New York, it may be noted that the activity of certain committees of the bar in the city of New York since the date of the promulgation of the Canons of the American Bar Association has been most commendable, *but at the expense of these associations*, in weeding out from their membership, on complaints made upon the proper judicial authority, men accused of various forms of professional misconduct, so that for this particular period there has been an unusual number of decisions in the reports of the state of New York of attorney cases, resulting in censure, suspension, disbarment. In many cases there has been a complete vindication and rehabilitation of the accused lawyer, for it is equally the function of such a disciplinary tribunal to protect the honorable and reputable member of the profession against injury or hold-up attacks as to rebuke and punish the man who has violated his oath of office.

In the third place, it may be stated that once we concede that the judiciary of a state is to be a great business administrative body with a primary duty of administering justice, but with these necessary, coördinate and subordinate functions and duties, then it becomes proper to contend that there may be men appointed to the judiciary for the express purpose of being assigned to these administrative or disciplinary functions, so that the judges constituting the Board of Organization and Control, or the Committee of Discipline, may be assigned upon their appointment specifically to these functions and may never have to sit at all, except in emergencies, in the trial of causes, or in the hearing of appeals. It is obvious on the other hand that judges who have "done their bit" in the trial of causes or in the appellate work of this court may on passing the age of sixty, with their ripe experience and acquaintance with the members of the bar in their particular community, be assigned to the execution of these governing and disciplinary powers and relieved of the confinement and stress of the daily court work, and may in this way perhaps, render to the bench and to the profession the supreme service of which they are capable.

Section 11.—Justices of the peace.—The legislature may provide for the election or appointment of justices of the peace throughout this State except in cities of the first and second class, and may prescribe their jurisdiction and a method for reviewing their acts, but the powers of the justices of the peace

shall in no case be greater than the powers of the existing courts of the justices of the peace, hereby abolished.

The insertion of this section is apparently inconsistent with the general scheme of the whole proposed judiciary article, and yet it is an essential part of a satisfactory judicial scheme.[16] And this is so because of the very reason suggested by our observations above with regard to the tendency to erect rough-and-ready tribunals for the expeditious settlement of disputes between members of the community. It is very much in line with the rules of the New York municipal court above referred to, providing for the arbitration or conciliation of controversies. The justice of the peace is an institution rather than a tribunal. The powers that are conferred upon him by the legislature enable him to assist the machinery of government in the imposition of fines, and he acts as a shock-absorber to the courts in his ability to dispose in a rough-and-ready way of controversies which might otherwise assume larger proportions, and engage the time and attention of more important functionaries. In rural communities, where the court house is not easily available to those residing in a large county, the resident justice affords a method of dealing with petty and irritating disputes that has on the whole proved satisfactory in the experience of the community. At the same time it must be conceded that providing for such justices of the peace in a constitutional, judiciary article of the nature here propounded, is only warranted logically in a permissive form. It is obvious that the legislature in providing a method for reviewing their acts would naturally, as they have done in the case of workmen's compensation acts, impose upon the Supreme Court or the Court of the State in its proper appellate division or part, the duty of correcting such errors as might be permitted to be taken up on appeal.

Section 12.—Statutes, decisions and judicial statistics.—The legislature shall provide for the speedy publication of all statutes and of such decisions and judicial statistics of the Court of the State of New York as the Board of Assignment and Control may from time to time require by its certificate to the Secretary of State; but all statutes and decisions shall be free for publication by any person.

[16] See article in this issue by Herbert Harley, relating to these functionaries, and how their efficiency may be increased.

Some of the more far-sighted of those who have been working for reform in the administration of justice have insisted that the collation and publication of information in regard to the business of the courts, as with regard to the performance of duty by any other servants of the public, will itself result in a better administration and in so far as it has been possible in various communities to secure the publication of judicial statistics, in identical degree the courts themselves, confronted with the result of their labor and contemplating the residuum of work undisposed of at the end of a definite period have devised the means and machinery for expediting the discharge of their duties and making the courts more efficient. Therefore this is a most vital clause in the suggested plan of readjustment.

> **Section 13.—Present Justices and Judges.—The justices and the judges of the existing courts of record, hereby abolished, shall become justices of the Court of the State of New York to serve for the remainder of the terms for which they have been severally elected or appointed, during good behavior, and with such duties as may be assigned from time to time to each by the Board of Organization. The present salary of no such justice or judge shall be reduced during the term for which he has been elected or appointed.**

The only question in regard to this section might arise in the provisions that the judges taken over from the existing courts for the terms for which they were elected by the people might be unfavorably affected by the words, "during good behavior," and be subjected to a new disciplinary process which might terminate their enjoyment of the office before the expiration of the term for which they were elected. Assuming but not conceding this to be true, it is better that there should be a possible case where it might be claimed that the right of the judge to the office had been in some way violated and that he should have some claim for compensation, if he could find a court to endorse and effectuate such claim, after he had been removed for misconduct, than to amplify, enlarge or make too specific the section of the new Constitution.

If the people have the power by an amendment of the Constitution to abolish a court, to consolidate several courts, or to create new courts, it is obvious that by the same power they may terminate the enjoyment of office by existing officials. The supposed

case is not likely to occur, but in order that the court may readjust its new business and continue unhindered the disposition of existing business and equally in order that it may divisionalize its various functions so as to dispose of all grades of judicial business engaging the attention of all the consolidated courts at the moment of their change, it is fitting and appropriate that all the existing judiciary should be taken up into the new court of the state.

Section 14.—The Board of Organization.—The chief judge of the existing court of appeals and the presiding justices of the several appellate divisions of the existing supreme court, or their successors, together with three members of the bar who shall be in good standing and shall have been admitted at least fifteen years and who shall be appointed by the chief judge of the existing court of appeals, are hereby constituted the Board of Organization which shall consolidate all the existing courts of this State into the Court of the State of New York.

It shall adopt a seal for the Court of the State of New York, shall transfer to the Court of the State of New York all the business and records of the existing courts, and shall assign such of the clerks, officers and attendants of the existing courts to duty in the Court of the State of New York as may be requisite to preserve the continuity of the existing judicial business.

In organizing the Court of the State of New York, it may exercise any or all of the powers hereby conferred on the Board of Assignment and Control, and it shall continue in office until the Board of Assignment and Control shall be organized. It may appoint a secretary and employ all necessary legal and clerical assistance.

The chief judge of the existing court of appeals shall be the chairman of the Board of Organization.

This section is a section of temporary operation, but absolutely imperative. There must be some body charged with the duty of effectuating the transfer of business, the organization of the court and the adoption of a seal, the assignment of clerks, officers and attendants, the doing of any act "requisite to preserve the continuity of existing judicial business."

Section 15.—Procedure.—The statutes regulating the organization and procedure of the existing courts and the rules of the several existing courts shall become rules of the Court of the State of New York, subject to the provisions of Section

9 hereof, but the said statutes as statutes are repealed as of the last day of December, one thousand nine hundred eighteen.

The Board of Organization shall promulgate a schedule of statutes and rules hereby repealed.

This section presents the nexus between this constitutional article and the change in practice and the regulation of business, more summarily discussed in the closing part of this report, namely, the Short Practice Act and the Rules of Court.

It is of course assumed that when it is provided that the Board of Organization shall promulgate a schedule of statutes and rules hereby repealed that that carries with it the force of employes and the expenses necessary for the expeditious promulgation of such necessary schedules and this is involved definitely in the next section, Section 16.

Section 16.—Expenses of organization.—The legislature shall provide for all the expenses incident to the organization of the Court of the State of New York and to making effective the provisions of this article.

This section requires no argument in support of its reasonableness.

Since Part I of our report was written, we have received by courtesy of the American Judicature Society the report of the committee of the Mississippi State Bar Association, which has been at work for several years on a plan for unifying the judicial system of that state. It is with great satisfaction that we note the substantial similarity of our conclusions, due, doubtless, to the fact that we both started from the plan of the American Judicature Society as a primary suggestion.

It is well to note the substantial points of difference in the conclusions reached in this Mississippi draft.

A

In the first place, the judicial power of their state is to be vested in one general court consisting of three permanent divisions: (1) the Court of Appeals; (2) the Circuit Court; and (3) the District Court. The District Court is given full original jurisdiction over matters heretofore cognizable before the justices of the peace, and all matters at law or in equity where the amount involved does

not exceed $500 in value, and over certain misdemeanors, and any civil case where the parties so stipulate, regardless of the amount involved, but the jurisdictional amounts limiting the matters before this division may be varied by the Judicial Council, which corresponds to the Board of Assignment and Control. The term "Judicial Council" appears in many ways more felicitous, if not as definitive as the longer term to which we have committed ourselves.

The second division is called the Circuit Court, and is subdivided into a Chancery Division and a Law Division.

The first division is styled the Court of Appeals.

B

We commend the scheme for the organization of the Court of Appeals into divisions and note that the plan is not materially diverse from our own, and we note Section 3 of Art. VI, which provides that no case shall be adjudged in that court until the record or briefs have been fully read, or heard read *by at least three justices or judges thereof.*

C

The next point of difference is that it contemplates an elective judiciary, those who are members of the Court of Appeals being designated as "chief justice" and "associate justices," and the others of the Circuit and District Courts being called "judges." But there is an interesting requirement that no person shall become a candidate for judge or justice or be appointed thereto until he shall have been examined by the Judicial Council (1) upon his moral fitness, (2) upon his administrative and executive fitness, and (3) *upon his legal learning!*

With such safeguards upon the selection of candidates for judicial office the elective system loses its most objectionable features, but also loses its justification, for if the judicial council over which the chief justice of the general court presides, has this veto power, *it might as well have, through its chief justice, its selective power complete.* And in its discussion of its proposed plan, at page 28 of its report, the Mississippi Committee makes the following argument, which we deem of sufficient informatory interest to quote in full:

> The most serious objections to the elective system practically reduce themselves to two, which can be stated thus: (1) That judicial campaigns too fre-

quently degenerate into mere ordinary political or personal scrambles much below the dignity of the judicial office, thereby considerably lowering it in the public regard, with incapable and unfit men in some instances offering and being elected by the means of such methods as such men are the more apt to use, and (2) that local questions and temporary passions, and interested combinations, social, political or commercial, may deter a judge or else humiliate him by defeat. The first of these objections is met by providing that the candidate shall be examined on all the elements of his fitness. While this is not essential at all to the plan, we do suggest it in all seriousness and point to examples of such modern and enlightened principle as are already in use with us in reference to candidates for bank examiners and superintendents of education. If important as to those purely administrative officers, how much more so to those who pass judgment not only upon the property rights of our people, but even upon their very lives and liberties. It will be observed that ample provisions are suggested to secure entire impartiality and justness of decision on these examinations. There could certainly be no objection to the arrangement on the part of any candidate who really possessed, and was conscious of possessing, the suitable qualifications, and who being fit should be, and would be, willing to put the same to a test. In fact only fit men would offer,—the unfit would not appear for an examination. It is further provided that the Judicial Council shall prescribe and enforce general rules and regulations for the conduct of judicial campaigns and for the promotion of the dignity and integrity thereof. These two proposals simply would furnish additional means, by which the courts themselves, through the aid and agency of an authoritative and representative central head could be allowed, and could have the power, to work out their own salvation. The public expects, and rightly expects the courts to be above ordinary politics and political methods, and to exhibit a higher quality of honorable and efficient service, and yet the full means by which they are to attain to the high standard is withheld from them. Lawyers should continually call attention to these things.

The second objection is taken care of as hereinbefore alluded to by the enlarging of the circuits for election to six in the whole state, thereby getting the judges beyond any mere locality or provincial section and any evil punitive powers therein, and yet not making the area so large that the people therein may not have full opportunity to know the men that offer, and the separation of judicial elections wholly from any other precludes such evils as swapping and to a great extent the injection of factional politics therein. As to the district judges the second objection is not eliminated entirely. But the taking away from them of the liquor litigation and the fact that no large questions of general public interest will be before them and no cases of sufficient individual importance as to arouse any combined animosity greatly weakens its force. The people in the small territory of the district courts would know each candidate, his life, character and ability without the necessity of any extended campaign, and the extremely objectionable feature of a judicial candidate making in these small districts a house to house button-holing campaign could be eliminated by the proper regulations prohibitive thereof to be provided by the Judicial Council as aforementioned. And again, the whole matter is still further safeguarded against any egregious error in selection by the provisions for removal in intolerable cases by the Judicial

Council by a five to seven vote thereof, for causes shown. The elective principle possesses certainly one advantage and that is that the people will be unlikely, and it will be unusual, to remove a satisfactory judge, as has been the general experience wherever the plan is in operation. It will give greater permanency and stability in the personnel of the courts. Under the appointive system with us, faithful and efficient judges were removed to give place to political or personal preferences, and the Supreme Court has entirely changed in personnel several times within a period shorter than the term of one judge in some states,—a condition which is extremely objectionable especially in a court of last resort.

There is so much of merit in the appointive system, however, when not excessive power as to the number of appointments is granted to any one man, that undoubtedly a small portion of it ought to be preserved in any highly efficient judicial system. A combination of the elective and appointive systems, the former predominating, would produce results superior to either alone. We have suggested therefore such a combination and to that end, have suggested that the judges of the chancery division of the Circuit Court be appointed by the chief justice, who on account of the large measure of responsibility placed upon him for the workings of the department, and because of his superior means of knowledge of the qualifications of lawyers and judges, should exercise this function. There are many able lawyers whose services on the bench the state would be most fortunate to secure, who would under no conditions offer at an election. There are many whose habits of life and study are such that they possess not a particle of political capacity and who could not be elected. The state ought not to be cut off from the chance to secure the services of some few such men. These are usually just the character of lawyer who would most admirably meet the demands of the laborious service of the chancery division. That court is such, that few of the people attend it or have an opportunity to observe or know the judge. It is by no means a people's court, while on the other hand the judges of the law division of the Circuit Courts and of the District Courts with the attendance of juries and numerous witnesses before them, would be to a large measure at all times under close, general, public observation.

This combination of the elective and appointive plans would tend furthermore and greatly to get better results both in the elections and in the appointments. The people would no doubt take that pride and thought and care on the subject that the men elected by them should not be inferior generally to those appointed, and the appointing power would most certainly be extremely diligent and careful that his appointees should not rank in ability and character below those elected, each knowing that if in the end one continued to fall behind the other it would have to go by the board and the power be surrendered.

Some further of the appointive system has been suggested to be preserved in the filling of all vacancies by appointment by the Chief Justice by promotion. This is for the purpose (1) of avoiding special elections of which the people have had, and are having too many, and of which they are becoming exceedingly tired and are taking little interest, (2) because at such special elections there being generally several candidates there is election by mere plurality, which may be accidental, or even unfortunate, (3) for the inducement that such chance of promotion would present to good material to offer for circuit and district judges,

particularly the latter; (4) because it is better to promote an experienced judge than to select an entirely new man; and (5) to further relieve these appointments to some extent from our previous curse of mere politics in such matters.

D

We note also the amplification of the powers of the general court vested in this Judicial Council and the powers of such Council to make, alter, amend and promulgate all rules regulating the pleading, practice and procedure in all the courts. There is a provision that the legislature may repeal any such rule in whole or in part, provided it has been given two years' trial in operation.

E

We note further the short term idea for the Chief Justice of four years.

We note further that removal is to be by impeachment or a two-thirds vote of each branch of the legislature, except as to the judges of the second and third divisions who may be at any time removed "by at least a five to seven vote of the Judicial Council for (a) inefficiency, or (b) incompetency, or (c) neglect of duty or (d) conduct unbecoming a judge."

There is also provision for justices of the peace and permission to the legislature to establish municipal criminal courts and quasi-judicial tribunals. Any reader of our report who desires to examine the reasons proffered by the Mississippi Bar Association, whose address unfortunately is not appended to the report, can doubtless secure a copy of such report from the printers, Hederman Brothers, Jackson, Miss., or Herbert Harley, Secretary of the American Judicature Society, 31 West Lake Street, Chicago, Ill.

F

We notice that in providing for the division for the trial of causes not exceeding $500 in amount, the Mississippi Bar Association has commented as follows upon the English system which we have so strenuously advocated, in respect of the scheme of masters:

> One of the reasons why the trial courts in England have been able to handle, with a few judges, such an enormous number of cases per year, is because all non-contested cases are disposed of and all preliminary matters of pleadings, etc., are heard and made ready, by registrars, referees, masters, etc., who are *learned in the law.*

And it is to be noted that this division of courts of small jurisdiction, called "District Court," in the Mississippi plan, corresponds to the County Court scheme in England. In the debates that preceded the New York Constitutional Convention in 1915, it was urged with considerable force, and with the most sincere conviction in the upper part of the state, that the people would not consent to the abolition of the Surrogates' and County courts for the reason that they were locally accessible; that even though the judges presiding over these courts were not always men of supreme court calibre, yet they were of the vicinage, they were the confidants of the community and that if they committed errors of law, their acts were readily reviewable. The trouble with this criticism was that it assumed that, if the courts were taken up into a general court, the present scheme of differentiating between the Supreme Court with its terms and judges, and the County and Surrogates' courts with their terms and judges, would come to an end, and the people would be remitted to terms and sessions of a court not corresponding to that with which they were familiar. This begs the whole question and is far from being the purpose of the unification of the courts. For, if the Surrogates' Court of a particular county is taken up by this amendment into the Court of the State, nevertheless, the Surrogate or County Judge presiding, is also taken up into the judicial system, which contemplates a divisionalization of the jurisdiction of that court and an immediate and continuous assignment of that particular functionary to the same duties he has been discharging with the most important modification and development that in any matter coming before him for cognizance, he can exercise at law or in equity the plenary powers of the unified court into which his court has been taken up and assimilated.

G

In connection with our discussion of one or more appeals, it is interesting to note the general purpose of the Mississippi plan "to eliminate more than one trial in the court below and the delay and expense of two trials, where the lower court is presided over by a judge *learned in the law,*" that is to say, that appeals are duplicated only where taken up from a quasi-judicial tribunal or a justice of the peace, or district judge. Consequently from any divisional part of the unified court other than these, the appeal is direct to the

division of final appeal. Your committee has no quarrel with this device.

H

With regard to the method of selection of judges, we note that the Mississippi plan contemplates that with the exception of the chief justice, who is to be elected from the state at large, the associate judges and justices are to be elected territorially from within the various circuits and contiguous territories which are to be created by the Judicial Council, but we note this extract from the report with regard to the question of candidacy for judicial office:

> The size of the present Supreme Court districts, each covering one-third of the state deter all but a few from indulging in any active ambition towards the Supreme bench. Lawyers do not now practice over many counties as in years past. An able lawyer in one county may be almost unknown to the people at large in a distant part of one of our present Supreme Court districts. *To make now such a canvass as is necessary to become generally acquainted means the abandonment for months of their practice which few can either afford or will risk.*

Then, after discussing the question of the territorial arrangement of the circuits for the more important judicial offices, this proposition is set forth, which bears, we think, adversely on the question of the propriety of election to judicial office:

> It can well be apprehended that there is more than one circuit in the state at present where certain influences, or certain combinations, especially in those containing a large town or city, may hold the balance of the voting power, and put a judge in fear unless he do or omit to do as it shall be brought to his understanding that he is expected. This is obvious and need not be dwelt upon. *So being it must be safeguarded everywhere possible.*

PART TWO—SUGGESTIONS FOR A SHORT PRACTICE ACT

From the foregoing suggestions with regard to matters of sufficient permanent importance to be set forth in a Constitutional Judiciary Article, we pass to the second stage of this report, *i.e.*, what matters of procedure may properly be left to the control of the legislature as representing the people rather than committed to the courts for their regulation and development from time to time, that is to say, what ought a Short Practice Act to contain in contradistinction to rules of court.

From one point of view this is the most difficult task before the bar. It may be that the American Judicature Society has so con-

sidered it, because, having framed a general Judicature Act and being now engaged in formulating rules of general applicability, it proposes as the last stage of its service to the profession and to the community, to propose a model Short Practice Act. This committee has had the advantage of considerable material, but the wealth of it available has merely proved the magnitude of the task.

The English Judicature Acts, beginning with the Supreme Court Judicature Act of 1873, 36 and 37 Vict. ch. 66, marked a most interesting step in the evolution of the simplification of practice by the unification of courts. It consolidated into the Supreme Court of Judicature in England the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Westminster, the Court of Exchequer, the Court for Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, and divided the new court into two "permanent divisions," one under the name of "Her Majesty's High Court of Justice," which, it was provided, "shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior courts as is hereinafter mentioned," the other, "Her Majesty's Court of Appeal," which was "to have and exercise appellate jurisdiction with such original jurisdiction as hereinafter mentioned as may be incident to the determination of any appeal."

A member of the New Jersey bar[17] rendered a considerable service to that state by contrasting the courts and procedure in England and those in New Jersey with a view to the enactment of the Short Practice Act of New Jersey. The Connecticut Short Practice Act is probably as concise as any in operation. There has also been promulgated in the state of Illinois, "An Act in Relation to Practice and Procedure in Courts of Record."

The Rodenbeck Commission in New York in its report hereinbefore referred to,[18] drafted a Civil Practice Act of seventy-one sections, which has been subjected to very careful and, in the main, sympathetic examination and criticism—in particular, by a committee of the New York State Bar Association in 1916. With the following preliminary statement we are in hearty accord:

"The present code system in this state of regulating details of

[17] Hartshorne, *Courts and Procedure, England and New Jersey*, published by Soney & Sage, Newark, New Jersey, 1905.

[18] Vol. I, 1915.

practice by statute has been tried and has so lamentably failed and has been condemned in such unmeasured terms that it may be passed by without further comment."[19]

The most helpful, interesting and valuable examination and criticism was made by a subcommittee of the "Committee on Practice and Procedure in the Supreme Court" of the New York County Lawyers' Association, of which Mr. Max D. Steuer was chairman, which drafted a Short Practice Act of fifty-six sections. Your committee deems this draft of sufficient importance to annex it as an exhibit to this report, marked "A." For the purpose of this discussion, however, and to support our contention that any such act must be less specific, we venture to call attention to Sections 20 to 29 inclusive, which relate generally to examinations of parties and inspections of documents before trial within or without the state, and contain nearly 1,400 words.

Each of these sections is in itself concise and specific and presents a particular phrase of the subject-matter covered, but in our judgment it is too voluminous and too specific. Having the force and operation of a statute the mere fact that it is provided elsewhere in the same statute that it shall be "liberally construed" will not alter the fact that, as with similar provisions in the past, procedural statutes are usually construed into refinements, elaborated into particulars that have led the legislature to enter upon a career of amendments and supplements that soon swell the original compact statute into an unwieldy code. We have selected, accordingly, these particular sections for the purpose of illustrating our primary contention that in a statute as well as in a constitutional provision the treatment should be generic and not specific. We start, therefore, with the premise that in our proposed constitutional article there has been provision made for the appointment of Masters or Supreme Court Commissioners before whom the preliminary, interlocutory or supplementary procedural motions shall be brought on by summons for direction and disposed of by "omnibus order" under such general rules as the Court of the State may promulgate.

If such provision be made in the Constitution and such rules

[19] Report of the Board of Statutory Consolidation of the state of New York, on a Plan for the Simplification of the Civil Practice in the courts in this state (1912).

be promulgated, then these sections of a Short Practice Act need not be so elaborate or specific and in the Master's office all the details of the necessary orders to be entered can be all disposed of under the "omnibus order" and on the return of the summons for direction. If this be possible, then, so far as the short practice act is concerned, its provisions could be embraced within one broad, comprehensive section, reading perhaps as follows:

EXAMINATION BEFORE TRIAL, AND DISCOVERY

1. Upon such notice and terms as the Court by its rules may from time to time prescribe a party may before trial and within or without the state, take, before a Master or an officer authorized to administer oaths, the testimony of another party or of any witness, on oral or written interrogations and upon reasonable notice to all other parties to the action to whom the opportunity of cross examination is hereby reserved. Upon any such examination any material papers, books or records, may be required by any party to be produced by any other party and examined and copied in whole or in part.

Provided that upon the trial of the action the Court may exclude such testimony or copies or parts thereof as may not be necessary for fairly disposing of the cause, and may impose costs upon any party found by it to have proceeded for such examination or discovery in a vexatious, dilatory or unreasonable manner.

2. *Inspection and identification of documents.* Upon such notice and terms as the Court by its rules may from time to time prescribe, upon application of any party before trial the Court, or a Master thereof, may by order require any document or books referred to in any pleading or affidavit in the cause to be produced for inspection or a sworn copy thereof furnished; and the Court or such Master may deal with such documents, books or sworn copies in such manner as shall promote the fair disposition of the cause at the trial thereof.[39]

The object of these applications is assumed to be twofold: (a) Theoretically, the more the facts are known to the parties on both sides before actual trial the greater likelihood there is of a settlement of the controversy without troubling the court by a trial. (b) But if not settled, then everything essential to the "fair disposition" of the cause is certainly made available to the trial court. There is less likelihood of "surprise," and fair-minded counsel having inspected letters, alleged releases, accounts, mutual or stated, or admissions in documents or books of account, can more faithfully advise their clients and save the time of the courts and the public moneys.

The object of being general rather than specific in such sections

[39] Cf. §§ 20–29, *post*, of Exhibit A.

of a Short Practice Act is that the court by its rules may deal with details and conform them to the curing of abuses that develop from time to time. Punitive costs, perhaps imposable on the attorney jointly with the client, will operate as strong deterrents to abuses.

It must of course be conceded that conciseness is not always consistent with comprehensiveness, nor is it necessarily synonymous with clarity. The point, of course, for statute-makers is primarily: what do you wish to accomplish? And in respect to certain statutes it is more important to make your meaning clear than compact. But, if we once concede the propriety of a court's making procedural rules, then we must concede the impropriety of carrying too much detail into a Short Practice Act. Such an act alone is not a cure-all. A friend recently told the writer that even in Connecticut it took five months after the first pleading was served before the issue was finally joined and ready to be tried by the court. It is of itself alone no guaranty, therefore, against the law's delay.[21] A lawyer determined to gain time for his client it appears can do so even under a Short Practice Act. We respectfully submit that under the operation of the scheme of Masters no such delay could be secured, if the Master were alert, conscientious and keenly aware of the dignity and importance of his office. But we are satisfied that the Short Practice Act recommended by the subcommittee of the New York County Lawyers' Association is an improvement upon prior models, so far as the state of New York is concerned, but we urge that a sympathetic and intelligent blue pencil could accomplish in several other of the sections a satisfactory condensation in volume.

The inquiry must be when the legislature comes to deal with the enactment of a Short Practice Act, "To what extent shall the people through their representatives in the legislature let go of their control of the administration of justice?" The unfortunate feature of this inquiry is exactly the same as was pointed out by Mr. Rufus Choate in discussing the question of an appointive judiciary. The rights of the people to control are not to be divested. The people are simply committing to trained and intelligent agents, to wit: the judiciary of the state, the doing of this specific task of regulating procedure. The people are vesting in public service

[21] See article published herewith, by Mr. Martin Conboy, of the New Jersey and New York bars, on the operation of the New Jersey Act.

commissions and workmen's compensation boards and in other boards and agencies, their various powers of regulation—some powers quasi-judicial, some in aid of the executive, some purely administrative—but all of them powers intended to be intrusted to efficient instrumentality and for the purpose of having the *people's work efficiently done*. It is on precisely the same theory that we contend that the judiciary with the assistance of the bar is more competent to devise and to administer, and to keep up to date, methods of judicial administration.

We plead, therefore, for a minimum of legislative regulation through a Short Practice Act. We plead for a minimum of specific sections in such an act. We urge that it will be unfortunate if into such an act is written more than the skeleton of practice, its mere essential bones—for the moment that the act deals with anything that might be described as the muscles or the arteries or the veins of the procedural body, then there will grow up litigation, urging that the legislature intended by the inclusion of a provision in this particular respect in the *act* to divest the court of the power of regulating it by its *rules*. Our recommendation in respect to this matter of a Short Practice Act generally, with particular reference to the state of New York, is that the legislature on the advice of the bar associations of the state which have already given more than customary attention to this very subject, should enact a Short Practice Act and that thereupon the New York associations of the bar should await the uniform Short Practice Act to be promulgated by the American Judicature Society and then should coöperate with the Committee of the American Bar Association on uniform state laws and in the conferences of that association with other bar associations should endeavor to secure throughout the United States the enactment of a Uniform Practice Act.

Theoretically, there is no reason or justification for a differentiation in practice between the state and federal courts, or between the courts of New York and the courts of New Jersey, or the courts of Massachusetts and the courts of California. The ingenuity of the bar and a general national spirit could even reconcile the difficulties inherent in adjusting the practice of Louisiana to that of Ohio. The bar of the country cannot render a greater service to the nation than by enlisting heartily and sympathetically in a movement for a uniform practice in all the courts of the land,

This will do more than any other single influence to create a nationalization of the people of the various states and without the loss of a single substantial right.

It may be that the citizens of various localities are entitled to certain rights and remedies as against aliens, but if local litigants are protected by adequate provisions for security for costs against long-distance opponents, there is no reason why American citizens dealing with one another in their business interests throughout the land should not find uniform and homogeneous tribunals of justice open to the adjustment of their disputes in every state of the Union. As it is (to take but one illustration), a man may have practiced before the Court of Appeals of the state of New York for forty years and may never have had occasion to go to the Supreme Court of the United States in a federal case. And he may be as ignorant as the merest law student of how to secure a writ of error and how to print and prepare his papers. It is this very differentiation which makes it important and necessary for the protection of litigants that although a lawyer may have been a member of the Pennsylvania bar for thirty years, he cannot now be admitted to the bar of the state of New York except upon conditions insuring his familiarity with the New York practice extending over a specified term of years. This is, of course, irrespective of the courtesy extended by local courts of hearing counsel admitted on a motion *ad rem*.

We offer two illustrations to show the unwisdom of having procedural matters controlled by legislative enactment:

ILLUSTRATION No. 1

In 1896, Section 803 of the New York Code of Civil Procedure read as follows:

Sec. 803. *The court may direct discovery of books, etc.* A court of record, other than a justices' court in a city, has power to compel a party to an action pending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy of a book, document, or other paper, in his possession or under his control, relating to the merits of the action, or of the defense therein.[22]

In 1896, and down to the present time, Section 804 of the Code of Civil Procedure read as follows:

[22] 2 R. S. 199, Section 21, consolidated with Co. Proc., section 388.

Sec. 804. *Rules to prescribe the cases, etc.* The general rules of practice must prescribe the cases in which a discovery or inspection may be so compelled, and the proceedings for that purpose, where the same are not prescribed in this act.[33]

In 1896, Subdivision 3 of Rule XIV of the General Rules of Practice was amended to read as follows:

3. Either party may be compelled to make a discovery of any book, document, record, article or property in his possession or under his control, or in the possession of his agent or attorney, upon its appearing to the satisfaction of the court that such book, document, record, article or property is material to the decision of the action or special proceeding, or some motion or application therein, or is competent evidence in the case, or an inspection thereof is necessary to enable a party to prepare for trial.[34]

As early as the year 1901, in the case of *Auerbach* v. *Delaware L. & W. R. R. Co.*, 66 A. D. 201 (Fourth Department), it was held that in enlarging the scope of this rule so as to include property other than that specifically mentioned in Section 803 of the Code, the Convention of Judges, held in 1895, exceeded its authority, and the appellate division reversed an order granting plaintiff's motion for a discovery and inspection of parts of a locomotive boiler, through defects in which he claimed to have been injured.

The rule of the Auerbach case was followed in the case of *Pina Maya-Sisal Co.* v. *Squire Mfg. Co.*, 55 Misc. 325 (Supreme Court, Erie County, 1907).

But it was not until the year 1909 (Chapter 173 of the Session Laws of that year) that Section 803 of the Code was amended so as to read: "book, document or other paper, *or to make discovery of any article or property.*"

By Chapter 86 of the Laws of 1913, Section 803 was again amended so as to read: "Permission to take a copy *or photograph* of a book, document or other paper."

The legislators doubtless feared that the right conferred upon the Convention of Justices, to provide in the General Rules of Practice for the taking of a *copy* of a book, was not broad enough to authorize them to provide for the taking of a *photograph! It took eight years to secure the legislative modification.*

[33] *Id.*, Section 22, amendment. See rules 14–16.

[34] Formerly rule 14, 1858; rule 18, 1871; rule 18, 1874; rule 14, 1877; rule 14, 1880; rule 14, 1884; rule 14, 1888; rule 14, 1896.

ILLUSTRATION NO. 2

On June 1, 1906, the justices of the City Court of the City of New York, in convention assembled, passed a rule ordering the clerk to make up a new calendar of trial issues for October, 1906. The rule further provided that no action then regularly on the calendar should be placed upon the new calendar unless a new note of issue, for which no fee was to be charged, should be filed with the clerk between certain dates.

In the case of *Willer* v. *Mink Restaurant Co.*, 60 Misc. 358 (City Court Special Term 1908), it was held that the City Court of the City of New York had no power to make such rule as it was in contravention of Section 977 of the Code of Civil Procedure, which then provided and still provides that:

> . . . . in the County of New York . . . . where a party has served a notice of trial, and filed a note of issue, for a term at which the case is not tried, it is not necessary for him to serve a new notice of trial, or file a new note of issue, for a succeeding term; and the action must remain on the calendar until it is dispensed of.

The Mink case followed the rule of the appellate term laid down in the case of *Rauchberger* v. *Interurban St. R. Co.*, 52 Misc. 518, in which the same rule was under consideration, and in which the same conclusion is reached.

Here we have the ridiculous situation of a court being unable to clear its calendar of dead wood, because its rule technically contravenes a section of the Code of Civil Procedure, which certainly had not been intended to achieve any such result.

To what extent will the relegation to the courts of this power of procedural regulation remedy these conditions? This brings us to Part Three of our report.

PART THREE—RULES OF COURT

We come now to the discussion of Rules of Court, with two general propositions assumed to be accepted:

(a) That a Judiciary Article has been written into the Constitution of the particular state, unifying the courts, and giving the unified court power to make its rules and discipline the members of the bench and bar, and that such court is constituted with an administrative body within its membership calculated to an effi-

cient disposition of court business, and that procedural details will be eliminated from the court's consideration by the creation of Masters, and that elaborate codes of procedure have been abolished.

(b) We assume that in the transition stage of such reform a Practice Act is necessary, but that it must be concise instead of diffuse, and that it must be generic rather than specific.

This brings us to:

(c) That there should be a free hand given to the courts to regulate the conduct of causes on trial or on appeal, elastic, readily amendable, including rules of evidence (if the legislature does not act in specific instances), and upon the formulation and setting in operation of such rules, that it becomes a cardinal principle that technical violation of the rules may be in proper cases disregarded by the trial court, and, unless substantial rights are thereby affected, shall be disregarded on appeal.

Under this discussion of rules we collate for the information of the Club certain authoritative statements from the various discussions of this subject in recent years:

1

It is no longer necessary to rely solely upon *a priori* argument in support of the plan to commit control of procedure to rules of court. This mode of dealing with procedural problems now has behind it wide and long-continued experience, at home and abroad.

(1) It has been in force in England since 1875, and now obtains also in Ireland, Canada, Australia and India.

(2) It has been in force with respect to practice in equity in the federal courts since 1842.

(3) It has been in force in the admiralty jurisdiction of the federal courts since 1842.

(4) The Supreme Court of the United States has had and exercised the power to regulate the details of procedure in bankruptcy by rules since 1898.

(5) The same court was given power to regulate practice in copyright causes by rules in the Copyright Act of 1909.

(6) The federal commerce court had and exercised the same power.

(7) It has been in force in New Jersey since 1912.

(8) It is now in force in Colorado.

(9) It has been in force within fairly wide limits in the Municipal Court of Chicago for seven years.

(10) It is also in force, within certain limits, in the Municipal Court of Cleveland.

(11) It has been in force for some time in modern administrative tribunals,

such as public service commissions, industrial commissions and the new Federal Trade Commission.[25]

To this may now be added the rules promulgated, and thus still under advisement, by the Supreme Court of the United States.

2

The power to regulate practice and procedure is properly a judicial power, and the rules should be subject to promulgation and change as the exigencies of the administration of justice may require. *Before the adoption of statutory codes of civil procedure the recognized method of regulating practice was through general rules of Court.* Since the adoption of codes, however, the courts, though probably still competent to exercise their judicial prerogative, have in general acquiesced in, if they have not felt themselves controlled by, the legislative procedural enactments.[26]

3

What is needed in a practical matter of this sort is the possibility of *making changes when they are needed,* to have the new rule made by the people who have to apply and interpret it, to have it made with reference to concrete cases, and to have pleading and practice develop from experience, just exactly as three-quarters of our ordinary substantive law does. If we had the flexibility and power of growth in procedure that we have in our substantive law, I venture to say we should have had very little difficulty with practice in this country.[27]

4

RULES OF PROCEDURE SHOULD BE LEFT TO THE COURTS

Again, as already foreshadowed above, the chief value of the reform proposed is that it substitutes for the inelastic legislative code now in operation, a project for rules, elastic and adaptable by the courts to changing conditions. If the reason for a change is valid in any degree, then the *reform should be given its full opportunity of operation, committing the entire matter of the formulation of the rules to the court at the outset.*[28]

5

The rules of court are subject to being abandoned as well as adopted at the will of the court. If a rule is not a good one, it is abandoned; we can get rid

[25] Extract from article entitled "Regulation of Judicial Procedure by Rules of Court" by Professor Roscoe Pound, 10 *Illinois Law Review* 163 (October, 1915).

[26] Extract from Report of special section of the California Bar Association, appointed to investigate and report upon the advisability of having matters of procedure and practice governed by rules of court rather than by legislative enactment, submitted to the California Bar Association in July, 1916.

[27] Extract from address of Professor Roscoe Pound delivered before the Ohio State Bar Association in 1915.

[28] Extract from Memorandum on the Report of the Board of Statutory Consolidation on the Simplification of Civil Procedure in the state of New York, submitted by the Lawyers' Group for the Study of Professional Problems.

of it just as quick as we got it. All we have to do is to call a meeting and pass a new rule or abolish the old one.

We work in connection with the bar association in drafting rules. Any lawyer in Chicago is entirely at liberty to come, and we are glad to have him come in and ask for an improvement in the administration of justice. If any lawyer in that city can suggest an improved rule, the judges take the matter up with the committee of the bar association, and finally the whole court considers it, and if it seems to the judges to be a good rule, it will be adopted and put into force at once. *We don't go to the legislature, and wait from two or four or six years to get something done.* You know, in this day of specialized business, with efficiency everywhere, we haven't the time to do that. We have to reform our courts and put into them the same aggressive spirit as we do into our other organizations.[29]

6

Furthermore, the existence of this great variety of minute, detailed statutory provisions has been breeding a great number of code lawyers, and by that I mean lawyers whose principal concern is with the statutory code of rules and not with getting justice for their clients.[30]

7

So far as the object of rules is to provide for orderly dispatch of business, with consequent saving of public time and maintenance of the dignity of tribunals, we ought to leave it to the tribunals, not to the parties, to vindicate them; and decisions with respect to such rules should be reviewed only for abuse of discretion. This principle is recognized to some extent in practice, as it stands. The order in which testimony shall be adduced, whether a party who has rested shall be permitted to withdraw his rest and introduce further testimony, the order of argument, in most jurisdictions the time to be devoted to argument, and many other matters of the sort are left to the discretion of the trial judge. The reason is that such rules as exist upon these points exist in the interest of the court and of public time, and not in the interest of the parties. But there are other rules resting upon the same basis, which, unhappily, are not dealt with in the same way. This is notably true in the law of evidence. Many rules of evidence are in the interest of expedition and saving of time, rather than of protecting any party; prejudice to the dispatch of judicial business is the objection rather than prejudice to a party. In all such cases how far the rule should be enforced in any cause should be a matter for the discretion of the court in view of the circumstances of that cause. Some courts, indeed, recognize this. But for the most part it has been assumed that there must be an absolute rule or no rule in these cases also as if substantive rights depended upon them.[31]

---

[29] Extracts from address by Chief Justice Olson, delivered in San Francisco in May, 1916, concerning the work of the Chicago Municipal Court.

[30] *New York World*, August 20, 1915. Remarks of Hon. Elihu Root in a speech before the Constitutional Convention of New York.

[31] Extract from article entitled "Some Principles of Procedural Reform" by Professor Roscoe Pound, 4 *Illinois Law Journal* 388 (January, 1910).

8

(1) No one can anticipate in advance the exact workings of a detailed rule of practice. Change and adaptation to the exigencies of judicial administration are inevitable. The judges are best qualified to determine what experience requires and how the rule is actually working.

(2) The opinion of the bar as to the working of a rule may be made known to and made to affect the action of the judges in framing new rules or improving old ones much more easily and with better results than where the legislature must be applied to.

(3) Small details do not interest the legislature, and it is almost impossible to correct them.

(4) Too often details in which some one member of the legislature has a personal interest are dealt with by legislation, and not always in accord with the real advantages of procedure.

(5) As experience shows that changes are needed and what they are, there ought to be a possibility of speedy adjustment of details of procedure. Only rules of court can meet this demand.[32]

This presents a most authoritative consensus of opinion in favor of this topic of our report.

There is a cautionary word, however, to be said. It is not unlikely that the preparation of the rules will always be affected by local, or, rather, personal, considerations. There is danger that it may be affected by the bias, due to education or professional experience, of the individuals engaged in drafting them. This is peculiarly illustrated in the discussion in the following two extracts by one of the most helpful contributors to the discussion of this subject, Professor Roscoe Pound.

In discussing the "Field Code" of 1848, Professor Pound remarks:

9

Field was not an equity lawyer and, thinking only of the legal situation, drafted some important sections in such a way as seriously to embarrass proceedings in equity. This was true particularly of the provisions as to joinder and as to cross demands, which took no account of the equitable doctrine of complete disposition of the cause and the practice of joining all persons interested in the subject of a suit in equity and proper to complete relief. Speaking of one of the provisions as to joinder, the Court of Appeals said in a wellknown case:[33]

"This provision, as it now stands, was introduced in the Amendment of 1852

---

[32] Summary of advantages made by Professor Roscoe Pound and used by him in many articles and papers, among other places, in the article in the No. 4 *Illinois Law Review*, 388 entitled "Some Principles of Procedural Reform."

[33] *New York, & N. H. R. Co.* v. *Schuyler*, 17 N. Y. 592, 604.

because the successive codes of 1848, 1849, and 1851 . . . . had in effect abrogated equity jurisdiction in many important cases, by failing to provide for a union of subjects and parties in one suit, indispensable to its exercise."

Under a system of regulating procedure by statutory enactment of details, the judges were powerless in such a case. They could do no more than interpret and apply; they could not alter the rules, which, unintended by their author, operated in the daily work of the courts to defeat the substantive rights of parties in complicated causes. Only the legislature could apply the remedy to this condition. But the legislative amendment itself was in like manner rigid and unalterable. When it came, it did no more than mitigate the difficulty, since those who drew it had, as we are told, at best only "some remote knowledge" of the equity practice. In consequence the amendment and legislation founded upon it in other states has been a source of difficulty and a breeder of litigation for two generations.

A like mistake was made in the first rules under the Judicature Act in England. Those rules were drawn by men familiar with the practice in equity, with too exclusive attention to the exigencies of equity procedure, and in consequence proved a source of delay, expense and embarrassment in some classes of actions at law. But under the system provided by the Judicature Act the necessary changes came naturally and gradually. *It was not necessary to go to Parliament for new legislation to remedy each defect as it developed.* As experience showed what the difficulties were and how they might be met, the judges themselves were able to and did change the rules until, partly by revision as a whole at various times and partly by amendment of individual rules, they came into their present form. Thus at a time when the reformed procedure in America was struggling beneath an accumulated load of interpretation, amendment and controversy, which largely impaired its usefulness, the reformed procedure in England was undergoing a relatively rapid process of simplification and improvement.

An example of the manner in which power to regulate procedure by rules of court enables speedy correction of defects revealed in the course of judicial experience may be seen in the English Rules of the Supreme Court, Order 65, Rule 6A. As the practice stood prior to December, 1885, where a non-resident plaintiff was temporarily in England, security for costs could not be required of him. In December, 1884, a case was before the Court of Appeal in which the court was compelled to enforce the then practice. But it did so reluctantly and two lords justices pronounced the rule unjust. No application to Parliament for a legislative change of the law was required. In 1885 the judges adopted a new rule (Order 65, Rule 6A) providing that "a plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction." One needs only to reflect how slowly such a change would come about in an American code of civil procedure to perceive the expediency of judicial rather than legislative formulation of procedural rules.[34]

---

[34] Extract from article entitled "Regulation of Judicial Procedure by Rules of Court," by Professor Roscoe Pound, 10 *Illinois Law Review* 163 (October, 1915).

Again, after referring to the Field Code and how it grew from 391 to over 3,000 sections, Dr. Pound continued:

> Compare with this the method employed in the English Judicature Act. That act contained about 100 section, with a schedule of 58 rules of practice appended, leaving details to rules of court to be framed by the judges. In drawing up the first rules a mistake was made analogous to that made by the framers of the New York Code. The latter had their eyes chiefly on practice at law and in consequence made rules at many points which proved awkward of application to equity proceedings. Those who drew the Judicature Act and the first rules thereunder were equity lawyers, had their eyes too much on equity, and hence at first proceedings at law were made cumbersome and dilatory. An amusing exposition of the workings of the older rules may be seen in Judge Harris's book, *Farmer Bumpkin's Lawsuit*. But legislation was not necessary to effect a change. The judges themselves were able to and did change the rules as experience of actual application dictated, until the present rules were developed. How unfortunate the results of hard and fast legislation as to the details of procedure may prove in practice, is demonstrated by later English legislation with respect to workmen's compensation. Instead of leaving the details of procedure in such cases to general rules to be framed by those who were to administer them, Parliament enacted where appeals should go and in what manner, in such a way that in the reports styled *Workmen's Compensation Cases*, we meet frequent examples of appeals dismissed because taken to a Divisional Court instead of to the Court of Appeal or *vice versa*—about the only vestige of appellate procedure left in England.[35]

This emphasizes the importance, above asserted, of having a provision in the Constitution for authority for the courts to make rules, and some provision in the Constitution or the statute for membership in the Rules Drafting Committee of members of the bar so that between the members of the judiciary and of the bar all shades of practice may be represented and the particular situation properly covered.

A subcommittee of your committee has prepared the following schedule of topics which ought to be covered by the rules of court as distinct from being covered by a short practice act:

ACTIONS AND THEIR COMMENCEMENT

Parties—plaintiff and defendant
- Poor person
- Domestic and foreign corporations
- Guardian *ad litem*—Security

---

[35] Extract from article entitled "Some Principles of Procedural Reform," by Professor Roscoe Pound, 4 *Illinois Law Journal* 388 (January, 1910).

- Representative capacity
  - Executor
  - Committee
  - Trustee
- Appearance
- Pleading
  - Complaint
  - Answer
  - Counterclaim
  - Set off
  - Reply
  - Rejoinder
  - Interpleader
- Evidence

The rules of evidence should be broad general rules to be included in the rules of court.

It is the opinion of your committee that rules of evidence should not be placed in the Consolidated Laws nor in a statutory code of evidence. As stated in the report of the Board of Statutory Consolidation dated December 1, 1912: "These rules are largely under the control of the courts and the adoption of a liberal policy in disregarding errors on appeal not affecting substantial rights would discourage much of the technical practice now so common in relation to the admission and exclusion of evidence upon the trial of causes."

The salient features of the code of evidence presented to the legislature in 1889 by Mr. David Dudley Field and Mr. William Rumsey are available as precedents out of which a few broad general rules may be formulated which would be sufficiently elastic in their nature to afford substantial justice.

- Commissions to take testimony
- Physical Examination
- Notice of trial
  - Preference
  - Calendar practice and classification
- Trial by Jury
  - Challenges
  - Method of swearing witness
  - Non suit
  - Verdict
  - Disagreement
  - Waiver of jury
- Trial by Referee
  - Reference by consent

In the opinion of your committee where both sides agree upon a referee, the same must be appointed by the court except in matrimonial actions.

Judgment
- By default or confession
- Summary
- After trial or reference—after appeal
- Taxation and retaxation of costs
- Entry of
- Judgment roll
- Lien of
- Stay of
- Setting aside

In the opinion of your committee, the reinstatement of verdict reversed on intermediate appeal, should be provided for by rule.

Appeal
- Notice of
- Security
- Stay on
- Record on and filing

In the opinion of your committee, the original stenographer's minutes only should be before the court obviating the expense of printing the same.

- Notice of argument
- Preference
- Briefs
- Hearing
- Decision
- *Remittitur*

Execution
- Discovery in aid of and proceedings supplementary to execution

In the opinion of your committee, arrest and body execution should be limited to wages.

General provisions
- Forms of process, summons, subpoena
  - pleadings
  - affidavit
  - order
  - notice of claim
  - *lis pendens*

Papers
- Service and filing

Summons and motion for directions
- Amendment
- Pleading new cause of action by amendment, on terms

Consolidation and severance
Extension
Stay
Want of prosecution
Default
Argument
Payment into court and out of court
Gross sum, in lieu of annual interest
Regulations for court deposits held by banking institutions
Detention, inspection, preservation and survey of property
Arbitration of controversy
Judgment creditors' actions

PART FOUR—CONCLUSION

The generic purpose of the Phi Delta Phi Club, consisting as it does of graduates in New York and vicinity of the legal fraternity of Phi Delta Phi in the law schools of the country, *is to promote the acceptance and the realization of high ethical ideals.* In reports to the New York State Bar Association and to the American Bar Association at their meetings in 1917, the Committees on Professional Ethics emphasize the fact that the mere adoption of canons of professional ethics was a mere *brutum fulmen*, unless the profession is to carry the spirit of such canons into each professional relationship; that is to say, there must be an *applied* ethic; and the lawyer in his relation to the community must be a student of what Professor Ormond of Princeton used to characterize as the "*metaphysics of oughtness.*" He must be sensitive as a barometer to the evolutionary movements in the community life around him. He must never permit any idea of his personal convenience or profit to influence him in obstructing requisite reforms. Because he may have learned to practice under one scheme of procedure he must not be unwilling to adjust himself to the demands of the new generation for a more expeditious and efficient judicial administration. The days of the retainer and refresher may come again, and the contingent fee and the negligence specialist may largely disappear, but it is clearly to the interest of the legal profession in the last analysis to minimize the time between the summons and the judgment; between the assertion of the claim and the collection of the award. Modern conditions call for speeding up the machine and modern professional ethics make it, in the language of Hoffman's Tenth Resolution, "essential that should clients be disposed to insist upon captious

requisitions or frivolous or vexatious defenses, they shall neither be enforced nor countenanced" by the high-minded practitioner.

Professor Ormond, above mentioned, Princeton '79, and later a valued Professor of Philosophy in that institution, was summarizing in 1885 the philosophy of Herbert Spencer to a junior class and he said, "It is an attempt to weld together a sensational psychology and a transcendental ontology and to subsume it all under the concept of evolution."

It will not be a violent effort for the intelligent reader to apply this characterization to the relationship of the profession of the law to procedural reform.

If, as we said at the outset of this report, the administration of justice is the highest concern of man on earth, Burke was right, when he uttered that phrase, in assuming the transcendental nature of the professional career, at the bar or on the bench.

But it is obvious that while the task of accomplishing this great scheme of simplification is the primary duty of the lawyers of the land, it is equally obvious that numerically there will be a majority of the bar of any given period in opposition to that just ideal, and it is therefore the duty of those who are pledged to the ideal to gain support if possible from the general public in order to the accomplishment of the fundamental and structural changes in the Constitution and statutes of any state that are required to effectuate that ideal.

The word "ideal" is used with regard to reform subjects in two senses. By the "reformer" [a hackneyed term and with a content almost of reproach] it is used to designate the ultimate, desired goal in the evolution of some social condition. By the practical man who has not been able to study the matter in all its phases and connections the word "ideal" is used to indicate the impossible, the unachievable; and the reason why reforms progress so slowly is that the average legislator and the average voter look upon the "reformer" as a man without practical ideals and upon his ideals as Utopian and unworkable. It took a generation to fasten a code of civil procedure on the practice in the state of New York. It has taken another to realize the cruel grip it has on the welfare of the community. It may take another to fully cure the evils which it has wrought.

Your committee has had in mind, therefore, the fact that a constitutional change depends for its accomplishment upon the vote

of the general electorate of the state, and it realizes that the general electorate of the state does not always vote upon a constitutional amendment in the same numbers and with the same interest with which they vote for a particular individual as a candidate for an official carrying a salary.

It is hard to get the voters of the state to attend public meetings at which dry, legal, procedural reforms would be presented for discussion. Yet if they can be aroused and made to realize that their pockets will be profited and their property rights better safeguarded, their litigation expedited, their disputes more effectually and reasonably adjusted, a constitutional reform, even to the extent suggested in the draft Judiciary Article in Part I of this report, can be effected, or in the language of the man in the street, it "can be put across."

In the second place, a legislature is hard to deal with in the matter of procedural reform. The man who has made the profession of law a career and is unwilling to turn aside to the right hand or to the left, rarely runs for the state legislature. There are from time to time great lawyers in local legislatures, and the record of our public life is full of the public service rendered in Congress and in state legislatures by distinguished lawyers. And the legislature of the state of New York has given, by able men, the most careful study and unselfish and untiring labor to this general subject, as evidenced by the enormous record of the work of the Rodenbeck Board, and of Senator Walters' Joint Legislative Committee, and the bar of the state is under a great debt of gratitude to these men. But it must be remembered that these men are *doing this on the side*, and that it is not their chief and main duty or purpose. They have countless other claims upon their time and attention, and it is a marvel that their work is so little open to criticism in view of all these conditions. The four blue volumes which the board published in 1915 do not begin to represent the total labor of this board and of the Joint Legislative Committee that has been dealing with its work.

We are reminded by the nature of the labors of the latter committee of the experience of Theophilus Thistle, the successful thistle-sifter, who in "sifting a sieveful of unsifted thistles, sifted three thousand thistles through the thick of his thumb." The writer of this report was privileged by the Hon. J. Henry Walters, chairman of that legislative committee, to examine the detail of the work which

they had so carefully done. They had taken the more than three thousand thistles of code sections and sifted them, sentence by sentence. Each section was pasted upon a separate manila sheet about two feet square, each sentence in each section was sifted separately and a note made of whether as an adjectival provision it was covered by some general provision of the Short Practice Act, or relegated to the general domain to be covered by rules of court, or, if it was a provision of substantive law, then note was made of the fact that it was preserved and relegated to one of the consolidated laws, *e.g.*, Real Property Law, Domestic Relations Law, Public Officers Law, Judiciary Law, Personal Property Law, etc., or whether it would be repealed. It is obvious that such a task was colossal, and the report of the committee made to the legislature of the state on April 23, 1917, must receive very careful study.

We gather from the report as a whole that the committee does not give unqualified support to the report of the Board of Statutory Consolidation and that it has acquired additional material on the basis of which it, or a similar committee or agency, may be authorized to "prepare and submit a plan of simplification and proposed legislative bills therefor." But we remain unalterably of the opinion that constitutional amendments must accompany such a plan.

We proffer the Judiciary Article in Part One with due acknowledgement to the Group for the Study of Professional Problems and to the original Committee of Seven of this Club, as a starting point, for such a change.

We commend the Short Practice Act of the Committee on the Supreme Court of the New York County Lawyers' Association if boiled down into more generic conciseness, as a starting point for a legislative enactment.[36]

But in regard to the rules of court we believe that there must be a transition period during which, after the unification of the court and the operation of the Short Practice Act the existing rules, so far as not inconsistent with the change, shall continue in operation until the committee appointed by the Board of Organization and Control, including members of the bar, may have formulated appropriate rules.

If the regulation is to be left to the court, the court and not the

[36] See copy thereof, subjoined as Exhibit A.

legislature should create the rules. The experiment by the Supreme Court of the United States on both sides of the practice of the federal courts has been a great success. The work of the American Judicature Society, which is forthcoming, will be a most material aid. The American Bar Association conference of bar associations, convened by it, and the efforts of its Committee on Unification of State Laws, will all contribute to simplify the task of drafting and promulgating rules.

By courtesy of the *Illinois Law Review* and the Northwestern University Press, owners of the copyright, we append, as Exhibit B, a bibliography of this subject in its many aspects prepared by that wheel horse of progress, Roscoe Pound.

We submit the foregoing suggestions for the consideration of the general public as well as of our brethren of the bar, believing that, if public sentiment in favor of such reform and simplification develops, the enlightened opinion of the associations of the bar of the country, of the states and of the counties of the states, will combine to exert such pressure upon the legislatures that they will be willing to propound amended judiciary articles to the electorate and themselves enact such legislation as will carry the reform into operation. The maxims "bis dat qui cito dat," and "If 'twere well 'twere done 'twere well 'twere done quickly," do not necessarily apply. Rather, we would say, "If 'twere well 'twere done, 'twere well 'twere well done."

EXHIBIT A[37]

CIVIL PRACTICE ACT

AN ACT FOR THE SIMPLIFICATION OF THE CIVIL PRACTICE IN THE COURTS OF THE STATE OF NEW YORK

The people of the state of New York, represented in Senate and Assembly, do enact as follows:

1. This act shall be known as the "Civil Practice Act," and except as otherwise expressly provided, shall apply to and govern the civil practice in all of the courts of the state.

2. The courts, within their jurisdiction, shall have all the powers, though not expressly conferred by statute or rules, necessary to the determination or enforcement of the rights of the parties.

3. There shall be but one form of civil "action" under this act in all of the courts subject to this act, which shall be so called,

[37] See Part Two of Report, *supra.*

whether heretofore denominated an action or special proceeding, except that the "writ of habeas corpus" is hereby preserved as a special proceeding.

4. In order to give effect to the provisions of this act and otherwise simplify procedure a convention composed of one justice of the appellate division of the Supreme Court in each department designated by such appellate division and one justice designated by the trial justices of such court in each department and one member of the bar of not less than fifteen years' standing designated by such trial justices, shall, subject to the reserved power of the legislature, have plenary power from time to time to make, alter and amend rules of practice and procedure, not inconsistent with law, binding upon all courts of the state and the judges and justices thereof (except the Court of Appeals, unless otherwise expressly stated, and the court for the trial of impeachments), which shall be called the "Civil Practice Rules." Courts of record may also make such rules as may be necessary to carry into effect the powers and jurisdiction possessed by them, not inconsistent with the foregoing rules.

5. Until the Civil Practice Rules shall be made as herein provided, the rules hereto annexed shall be the rules of the courts governed by this act subject to such changes and additions as the legislature or the courts may make from time to time.

6. The procedure in the courts governed by this act shall be according to the provisions hereof and the Civil Practice Rules to be made from time to time, as herein provided, and in cases where no provision is made by statute or rules, power to make such rules as may be necessary for the conduct of appeals in the Court of Appeals, shall be vested in the judges of the Court of Appeals, and the power to make such rules as may be necessary in the conduct of trials and appeals in the several departments, shall be vested in the appellate division in the several departments.

7. The court, in its discretion and in the interest of substantial justice, may suspend, in whole or in part, the operation of any general rule of practice, but such action may be reviewed by the appellate division upon appeal.

8. At any stage of any action, special proceeding or appeal, a mistake, irregularity or defect may, in the discretion of the court, be corrected or disregarded, providing that a substantial right of any party shall not be thereby affected.

9. No action or proceeding shall fail or be dismissed on the ground that a party therein has mistaken the court, venue, remedy, procedure or because of a misjoinder, non-joinder or defect of parties, if jurisdiction exists to grant the proper remedy; but in such case, upon terms, the matter shall be transferred to the proper court or place of trial, and the pleadings and other proceedings shall be so amended and new pleadings or other proceedings so

issued or taken, that the whole matter in controversy between the parties may be completely and finally determined.

10. Any pleading in any action before or at the trial may, upon suitable terms, for the protection of the opposite party, be amended by the statement therein of new or different cause or causes of action, defense or defenses, counterclaim or counterclaims, or in any other respect.

11. Actions may be consolidated or severed whenever it can be done without prejudice to a substantial right.

12. The courts shall always be open for the transaction of business; a term of court shall continue until a succeeding term is commenced, although the court is not actually in session. A stated term of court is the period designated for the term and during which the court is actually sitting. Trial terms shall be designated as jury terms and court terms. Terms for the hearing of motions shall be known as "motion terms." An order whether issued by a court or a judge thereof shall be the same in form and effect.

13. Any causes of action may be set up in the same complaint and any counterclaim or defenses may be set up in the same answer. The court in its discretion may order one or more issues to be separately tried prior to the trial of any other issues in the case. No action or defense shall fail in whole or in part because a party has an adequate remedy in law therefor, but the court may grant such relief in law or equity with or without a jury as the case may require.

14. Every action shall be prosecuted in the name of the real party in interest, but the executor, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute, may sue in his own name without joining with him the party in whose interest the action is brought.

15. Every action shall be commenced by the service of a summons requiring the appearance of the defendant within ten days thereafter, the mode of service to be prescribed by rules.

16. Where a complete determination of the action cannot be had without the presence of other parties than those named, they shall be brought in; where a person not a party has a title or an interest or a right of any character which the judgment will affect, he may and upon his application must be made a party.

17. The complaint shall concisely state the facts constituting each cause of action. The answer must contain specific admissions or specific denials with respect to the allegations of the complaint or a concise statement of the facts relied upon for a defense. Whenever the answer alleges new matter constituting an affirmative defense or sets up a counterclaim the plaintiff must in like manner make a reply. Any material allegation in the complaint or answer not specifically controverted in the answer or reply shall be deemed admitted.

18. Objections to a pleading in point of law shall be taken either by motion or in the answer or reply.

19. Disposition shall be had by general motion to be made within twenty days after the action is at issue of all matters of procedure and of preliminary and anticipatory relief, including motions for judgment on the pleadings. The mode thereof shall be prescribed by rules. All further relief, other than trial or appeal, shall be granted only in the discretion of the court and upon suitable terms.

20. A party at any place within or without the state before an officer authorized to administer oaths and at any time prior to the trial of an action may examine a party without being bound by the testimony thus elicited provided the examination is had upon reasonable notice to the other parties to the action. The court may in its discretion on good cause shown provide by order that on the examination of a party the material books and records of such party may also be examined.

21. A party, at any place without the state, before an officer authorized to administer oaths, may upon such terms as may be fixed by the court, take the testimony of any person provided all other parties to the action shall have had reasonable notice and shall be afforded an opportunity to cross-examine orally. The court may in its discretion on good cause shown, provide by order that on such examination any material books or records may also be examined. Either party may waive oral examination or cross-examination and submit interrogatories to a witness upon which the examination is to be taken.

22. A party may take the testimony of any witness within the state before an officer authorized to administer oaths at any stage of the action upon reasonable notice to all of the other parties to the action, provided full opportunity be afforded for cross-examination, upon the certificate of the attorney of record that the testimony of the witness is material and necessary, the testimony, however, only to be read in case that, with reasonable diligence, the attendance of the witness at the trial cannot be compelled by subpoena.

23. In case an examination or cross-examination under the three preceding sections is conducted in a vexatious or unreasonable manner, any person or party may apply to the court in which the action is pending for an order prescribing the manner in which such examination shall proceed and the court, upon such application, may impose such costs as a penalty as the court may deem just.

24. In any cause or matter the plaintiff or defendant by leave of the court or a judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: *Provided* that no party shall

deliver more than one set of interrogatories to the same party without an order for that purpose: *Provided also* that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

25. Any party may, without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion be thought fit. Provided that discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

26. It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

27. Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his attorney, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice: in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

28. Where inspection of any business books is applied for, the court or a judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. *Provided* that notwithstanding that such copy has been supplied, the

court or a judge may order inspection of the book from which the copy was made.

29. The court or a judge may, on the application of any party to a cause or matter at any time and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them.

30. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

31. Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. *Provided* that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favor of any person other than the party giving the notice: provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

32. Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the

determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think just.

33. The court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

34. The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his complaint dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

35. Any testimony taken in an action is admissible in any subsequent trial of the action in case of the death or disability of the witness subsequent to the taking of such testimony or in case that it be shown that the attendance of the witness cannot be compelled by subpoena.

36. A seasonable objection without an exception is sufficient to secure a review of any ruling in any court.

37. A final judgment, dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon the merits.

38. Issues of fact shall be submitted to the jury in such manner that, so far as practicable, upon a new trial they need not be again submitted to the jury, and to that end the court, in its discretion, may direct the jury to make special findings upon particular questions of fact. In granting a new trial, the court may order that any finding of the jury on any particular question shall be taken as final and conclusive.

39. A judgment may be rendered in favor of any party or parties, and against any party or parties at any stage of an action or appeal if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require.

40. An appeal as of right to the appellate division shall lie from an interlocutory or a final judgment also from the order entered upon the general motion. Such appeal shall bring up for review all questions of fact and law. An appeal from any interlocutory

order of the Supreme Court may be allowed by the appellate division.

41. The trial judge is authorized upon a motion for a new trial to direct such a judgment, notwithstanding the verdict, as should have been entered in the action at the time of the trial.

42. A judgment or order shall not be reversed or modified and a new trial shall not be granted on the ground of error in a ruling of the trial court unless it shall appear to the Appellate Court upon the whole case that, but for such error, there might have been a different result upon the trial.

43. Upon appeal, or on application for a new trial, the court in which the appeal or application shall be pending may, in its discretion, take additional evidence by affidavit or deposition, or by reference; *provided* it is done to supply proof of some omitted matter capable of being established by record or other incontrovertible evidence, defective certification, or the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to be competent.

44. The appeal shall be deemed to remove to the Appellate Court the entire proceedings in the court below, including the stenographer's minutes and all orders, documents and other proceedings had, taken or filed therein, but the rules or the court by order, may provide for the elimination of all unnecessary matter on the settlement of the appeal record.

45. A court or a judge is not authorized to extend the time fixed by law within which to commence an action; or to take an appeal; or to apply to continue an action, where a party thereto has died, or has incurred a disability; or the time fixed by the court within which a supplemental complaint shall be made in order to continue an action; or an action is to abate unless it is continued by the proper parties. A court or a judge may not allow any of those acts to be done after the expiration of the time fixed by law or by the order as the case may be for doing it; except where a party entitled to appeal from a judgment or order or to move to set aside a judgment for error in fact, dies before the expiration of the time within which the appeal may be taken or the motion made, the court may allow the appeal to be taken or the motion to be made by the heir, devisee or personal representative of the decedent at any time within four months after his death.

46. No right, obligation or liability shall fail or be impaired by reason of the passage of this act, or the adoption or passage of any rule, statute, amendment or a statute or repeal thereunder, or the failure to make necessary changes in any statute or rule to conform thereto, or the commission of any clerical error in connection therewith unless it shall clearly appear that a change was intended.

47. This act and the rules adopted thereunder shall not supersede the procedure in any court, regulated by any other statute or

rules adopted thereunder, but such statute and rules shall continue to govern the practice in such court; and when the practice in the Code of Civil Procedure or the General Rules of Practice has been incorporated in any such statute or rules by reference, the provisions shall be deemed in force for the purposes of such reference notwithstanding their repeal by this act; but where the procedure in any court or in any action or proceeding is not otherwise specially regulated it shall be governed by the provisions of this act and the rules adopted in compliance therewith so far as applicable.

48. So far as necessary for the preservation of the rights of the parties the practice in any action or proceeding heretofore commenced shall be conducted in accordance with the practice existing on the day before this act shall take effect. So far as practicable, all subsequent proceedings in such action or special proceeding shall be in conformity with the provisions of this act.

49. The omission to make necessary changes in the language of any statute or rule or any clerical error made in connection with the preparation of the new practice shall not cause any action or proceeding to fail or be impaired, but such statute or rule shall be construed to carry out the true intent and purpose of this act.

50. Statutes and amendments of statutes enacted as a part of the plan for the simplification of the civil practice, shall apply to all the civil courts of the state, and to all actions and civil proceedings other than those regulating the procedure in particular courts, so far as applicable, unless the contrary clearly appears from the context or the subject-matter specially regulated for any court, action or proceeding.

51. A reference in any statute, other than a statute regulating the procedure of any court, to the Code of Civil Procedure or to the General Rules of Practice shall be deemed to be a reference to the appropriate provision enacted or adopted, whether revised or not, as a part of the plan for the simplification of the civil practice, and where the practice in the Code of Civil Procedure or the General Rules of Practice has been incorporated heretofore in any such statute by reference, the reference shall be construed to refer to the new practice on that subject.

52. This act shall not affect the title or tenure to any office or employment or the salary or emoluments thereof, but the same shall continue as heretofore until modified or abolished.

53. A provision of an existing statute enacted as a part of the plan for the simplification of the civil practice shall be construed as having been enacted as of the time when it originally became a law and in case of subsequent amendment as of the date of the enactment of the amendment.

54. This act and all acts passed in connection with or in furtherance hereof shall be deemed and taken to be parts of the plan

for the simplification of the civil practice and shall be liberally construed.

55. Chapter 488 of the laws of 1876 and chapter 178 of the laws of 1880 and all statutes amendatory thereof and supplementary thereto, together constituting the Code of Civil Procedure, are hereby repealed.

56. This act shall take effect on the first day of September, 1918.

EXHIBIT B[38]

A BIBLIOGRAPHY OF PROCEDURAL REFORM, INCLUDING ORGANIZATION OF COURTS[39]

BY ROSCOE POUND[40]

ADAMS, E. L. Some Features of Civil Procedure in England: 31 Proc. N. Y. St. Bar Assn. (1908) 61.

ALGER, GEORGE W. Stopping Point in Litigation: 79 Central Law Journ. 333.

Swift and Cheap Justice: The World's Work, Oct., Nov., Dec. 1913, Jan. and Feb. 1914. (The first article of the series deals with Organization of Courts.)

The Old Law and the New Order (1914), Chap. 3, "Treadmill Justice."

ALLEN, S. H. Civil Procedure in Kansas: 35 Rep. Amer. Bar Assn. (1912) 861.

Revised Code of Procedure in Kansas: Proc. Mo. St. Bar Assn. (1909) 189.

The Kansas Revised Code of Civil Procedure: 21 Green Bag 266.

AMBLER, BENJAMIN M. A National Commission on Judicial Administration: The Bar (Journ. of W. Va. B. A.), Dec. 1914.

AMERICAN BAR ASSOCIATION BILLS. Hearings before the Committee on the Judiciary, House of Representatives: Serial 8, pts. 1 (Dec. 17, 1913) and 2 (Feb. 27, 1914).

[38] Reprinted by permission from *Illinois Law Review*, Volume Eleven, Number Seven, Copyright 1917, Northwestern University Press.

[39] This bibliography was prepared in two parts (one dealing with reform of procedure and the other with organization of courts) for the special section of the California Bar Association appointed to investigate and report upon the advisability of having matters of procedure and practice governed by rules of court rather than by legislative enactment. The former part was printed in the report of the section presented to the Association at its meeting in August, 1916, and both parts were printed in the *Recorder* of San Francisco. The two parts have now been merged in a new bibliography and the whole has been brought down to date. The compiler acknowledges his indebtedness to Professor Herbert Harley of Northwestern University for a number of suggestions in connection with this bibliography.

[40] Dean of Harvard University School of Law.

Report of Special Committee to Prevent Delay and Unnecessary Cost in Litigation: Rep. American Bar Assn., XXXIV, 578,589–595 (1909).

Committee on Uniform Judicial Procedure: Report 1914, 39 Rep. Amer. Bar Assn. (1914) 571.

Special Committee to Consider and Report whether the Present Delay and Uncertainty in Judicial Administration can be Lessened and, if so, by what Means: Report [n. d.].

Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation: 34 Rep. Amer. Bar Assn. (1909) 578; 35 Rep. Amer. Bar Assn. (1910) 614, 635.

Simplification of Judicial Procedure in Federal Courts, Report of the Committee of the Judiciary to Accompany S. 4551 printed January 2, 1917.

United States; House of Representatives, Sixty-fourth Congress, First Session, Hearings Before the Committee on the Judiciary on H. R. 14974 to Amend the Code of the District of Columbia. Washington, Government Printing Office, 1916.

AMERICAN JUDICATURE SOCIETY. Bulletin No. 1: Suggested Causes for Dissatisfaction with the Administration of Justice in Metropolitan Districts, 1914.

Bulletin IV-A: Second Draft of so much of the Metropolitan Court Act as Relates to the Selection and Retirement of Judges.

Bulletin IV-B: Second Draft of a Model Act to Establish a Court for Metropolitan Districts, 1916.

Bulletin VI: Organization of Courts; Methods of Selecting and Retiring Judges: Local Courts of Limited Jurisdiction, 1914.

Bulletin VII: First Draft of a State-Wide Judicature Act, 1914.

Bulletin VIII: Informal Procedure. The Branch Court of Conciliation of the Municipal Court of Cleveland, by Judge *Manuel Levine*. Introduction by *John H. Wigmore*. The Small Claims Branch of the Municipal Court of Chicago, by *Herbert Harley*.

Bulletin IX: A Modern Unified Court, a Plea for Its Establishment in Massachusetts, 1915.

Bulletin X: The Selection, Tenure, and Retirement of Judges, 1915.

Bulletin XI: English Courts and Procedure, by Prof. *William E. Higgins*.

Bulletin XII: Commercial Arbitration in England, by *Samuel Rosenbaum*. (Appendix contains Arbitration Rules of the Arbitration Bureau of the Chicago Association of Credit Men.)

AMIDON, C. F. The Refuge of the Criminal: Outlook, July 1906.

New Federal Equity Rules: West Publ. Co.'s Docket, Feb. 1913, No. 37, p. 891.

The Quest for Error and the Doing of Justice: 40 Amer. L. Rev. 681.

AMRAM, D. W. Canadian Sidelights on Prospective Changes in Pennsylvania Procedure: 62 Univ. Pa. Law Rev. (Feb. 1914) 269.

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: Report of Committee of Fifteen on Proposals to be laid before the Constitutional Convention, March 13, 1915.

BALDWIN, S. E. How Civil Procedure was Simplified in Connecticut: 35 N. Y. St. Bar Assn. (1912) 167, 829.

BALDWIN, WM. H. The Court of Domestic Relations of Chicago: 3 Jour. Am. Inst. Crim. L. and Criminol. 400 (1912).

BALL, D. H. Practice and Procedure in Michigan: 35 N. Y. St. Bar Assn. (1912) 897.

BATES, HENRY M. Popular Discontent with the Law and Some Remedies Therefor: Mich. St. B. A. Rep. (1913) 99.

Law Schools and Reform in Procedure: Ill. St. Bar Assn. (1914) 399.

BAUSMANN, FREDERICK. Reflections Upon the Causes of Crime in the United States: 38 Amer. Law Rev. 542.

Are Our Laws Responsible for the Increase of Violent Crime?: 33 Rep. Am. Bar Assn. 489.

BIGGS, A. W. Unrest as to the Administration of Law: Proc. Tex. St. Bar Assn. (1912) p. 177; Mo. St. Bar Assn. (1912) p. 92.

BLATT, WM. M. Systematic Law Reform: 20 Case and Comment 600.

BOSTON, CHAS. A. Some Practical Remedies for Existing Defects in the Administration of Justice: 61 U. of P. Law Rev. 1.

BOSTON, CHAS. A. AND ABBOTT, EVERETT V. The Judiciary and the Administration of the Law: 45 Am. Law Rev. (1911) 481, 587.

BRECKENRIDGE, R. W. Defects in the Administration of Law: Address before St. Paul College of Law, St. Paul, Minn., June 16, 1910.

BRIEF ON BEHALF OF AMERICAN BAR ASSOCIATION. Submitted to Judiciary Committee of each House [n. d.] as to Bills for Reform of Federal Procedure.

BROWN, E. R. Some Faults of Legal Administration: 31 N. Y. St. Bar Assn. (1908) 136.

BRUCE, A. A. The Office of the Appellate Judge: 1 Quart. Journ. of Univ. of N. D. (1910) p. 3.

BRYAN, GEORGE. The High Cost of Appeals: 28 Va. St. Bar Assn. (1915) 283.

BRYAN, P. T. Judicial Administration and Legal Procedure: Mo. St. Bar. Assn. (1911) 19.

BULLITT, J. F. Synopsis of Pleading and Practice in Virginia: 35 N. Y. St. Bar Assn. (1912) 1027.

BURDICK, W. L. Failure of Remedial Justice: 19 Yale L. Journ. (1910) 409.

CARTWRIGHT, J. H. Present but Taking No Part: 10 Ill. Law Rev. 537.

CHICAGO BAR ASSOCIATION. Communication from President *Edgar B. Tolman* to its Members Relative to Reform of Procedure Through Rules of Court [n. d.].

Conference Bill and Gilbert Bill: Discussed by Mr. *Gilbert* and Mr. *Tolman*, Apr. 1911.

Report of Committee on Amendment of the Law and Report of Judiciary Committee: Report, 1907.

CLARK, WALTER. Reform in Law and Legal Procedure: Address before N. C. Bar Assn. 1914.

CLEVELAND BAR ASSOCIATION. Report of Committee on Judiciary and Legal Reform, Mar. 30, 1914.

COLEMAN, CHAS. T. Trial by Jury: Ark. St. B. A. (1914) 53.

COLORADO BAR ASSOCIATION. Report of Committee on Law Reform: Colo. St. Bar Assn. (1912) p. 235; (1913) p. 325.

COURTS. *Teisen, Axel*, Courts and Practice in Denmark, Norway and Sweden (p. 523); *Ringrose, H.*, The Courts of Great Britain (p. 529); *Peterson, F. H.*, The Courts of Germany (p. 534); *Penfield, W. S.*, The Courts of the Republic of Panama (p. 540); *Palmer, T. W.*, Spanish Courts (p. 547); *Wheless, J.*, The Central American Court of Justice (p. 551); *Bonnet, C.*, The Supreme Court of France (p. 558): 21 Case and Comment, 523–564 (1914).

CRAWFORD, W. W. Practice and Procedure in Kentucky: 35 N. Y. State Bar Assn. (1912) 872.

CUTTING, C. S. Practice and Procedure in Illinois: 35 N. Y. St. Bar Assn. (1912) 850.

DENISON, J. H. Civil Procedure: Colo. Bar Assn. (1912) p. 177.

Simplification of Procedure in Civil Causes: 35 N. Y. St. Bar Assn. (1912) 822.

DENSLOW, VAN BUREN. The Relation of Organization of Courts to Law Reform: Ill. St. Bar Assn. (1885) 52.

ENGLAND. Sixth Report of the Royal Commissioners on the Civil Service, 1915 (deals with the organization of clerks and administrative officers—of no great importance for the United States).

EASTMAN, S. C. Practice and Procedure in New Hampshire: 35 N. Y. St. Bar Assn. (1912) 932.

FELLOWS, RAYMOND. Practice and Procedure in Maine: 35 N. Y. St. Bar Assn. (1912) 880.

FOREMAN, GRANT. Law's Delay: 13 Mich. Law Rev. 100.

FOLLETT, E. B. Proposed Reforms of Our Legal Procedure: 61 Ohio Law Bull. 1.

GILBERT, H. T. Administration of Justice in Illinois: Ill. St. Bar Assn. (1909) 309, 328.

GILBERTSON, H. S. Short Ballot and an Efficient Judiciary: 19 Case and Comment, 332 (1912).

GRAY, R. S. The Conduct of Trials in Courts; Some Radical Suggestions for Reform: San Francisco Recorder, July 28, 1913.

GREENE, J. E. Epitome of the Laws and Rules Regulating Procedure in Courts of the State of North Dakota, With Some Comments Thereon: 35 N. Y. St. Bar Assn. (1912) 954.

GROSSMAN, E. M. Some Reasons for the Growing Disrespect for the Law: Proc. Mo. Bar Assn. (1910) 134.

GUSTIN, J. D. Court Organization: 78 Cent. L. J. 200.

HALE, WILLIAM BAYARD. The Municipal Court of Chicago: World's Work, March 1910.

HALL, H. C. Efficiency in Courts of Justice: Colo. St. Bar Assn. (1912) 107.

HALL, JAMES PARKER. The Selection, Tenure and Retirement of Judges: (Address before Ohio St. Bar Assn. 1915), 61 Ohio Law Bull. 29; Bulletin X, American Judicature Society.

HARLEY, HERBERT. Circular Letter Concerning the Administration of Justice, 1912.

The Courts of Ontario: Ill. St. Bar Assn. (1913) 307.

Ontario Courts and Procedure: 12 Mich. L. Rev. 339, 447.

Court Organization for a Metropolitan District: 9 Am. Pol. Sc. Rev. (1915) 507.

The Scientific Attitude Toward Reform in Procedure: 75 Central Law Journ. 147.

The Model Municipal Court: 3 Nat. Mun. Rev. 57.

Organizing the Law Courts for Efficiency: The Survey, vol. XXXII, No. 18, p. 458.

A Unified State Court System: 7 Neb. St. Bar Assn. (1914) 108.

A Model Act to Establish a Court for Metropolitan Districts: 25 Yale L. Journ. 443.

Revised Civil Procedure in New York: 11 Ill. Law Rev. 37.

Modern Experiment in Judicial Administration: The Municipal Court of Chicago: Louisiana St. Bar Assn. (1915).

Justice and Inferior Courts: 22 Case and Comment 3 (in the same number of Case and Comment, Justice and Inferior Courts and related subjects are discussed by *William G. Cady, Charlton Edholm, Edmund C. Faulkner, Edgar K. Pennington, S. F. Davis, William D. Totten*).

Taking Judges Out of Politics: An. Am. Acad. Pol. and Soc. Sc., March 1916.

A Lawyer's Trust: Neb. Legal News, Jan. 2, 1915.

Present Data of Judicial Organization: Address before Oregon State Bar Assn. 1915 (not yet published).

Business Management for City Courts; A New Municipal Programme. (In press.)
Organization of the Bar: The Annals, March 1914.
The Municipal Court Idea: The American Leader, Sept. 25, 1913, p. 330.
The County Judiciary; A Model County Court: Proceedings of the First Conference for Better County Government in New York State. (1914.)
Present Tendencies in Judicial Reform: 9 Am. Pol. Sc. Rev., (1915) 529.
HARRIMAN, EDWARD A. Efficiency in the Administration of Justice: Address before Connecticut State Bar Assn. 1915.
HART, W. O. Comparison of the Constitutions of 1898 and 1913 and other articles relating to former constitutions and the Supreme Court and other courts of Louisiana: Printed by the Author for Private Distribution, 1914.
HARTSHORNE, C. H. Courts and Procedure in England and in New Jersey: Newark: Soney & Sage, 1905, chaps. 7–16.
The Practice Act (1912): 35 N. J. Law Journ. (1912) 269.
The New Jersey Practice Act of 1912: 3 Va. Law Rev. 18 (1915).
HAYNES, H. N. Statutory Changes: Colo. St. Bar Assn. (1913) 137.
HELM, LYNN. Practice and Procedure in California: 35 N. Y. St. Bar Assn. (1912) 818.
Reform of Legal Procedure: 44 Amer. Law Rev. 69.
Tendencies of Modern Legislation: Cal. Bar Assn. (1910) 4.
HIGBY, HARRY. Recent Changes in the Law: Ill. St. Bar Assn. (1913) 276, 287.
HIGGINS, W. E. Procedural Reform and the Bar: Ill. St. Bar Assn. (1913) 291.
English Courts and Procedure: American Judicature Society, Bulletin XI.
HODGE, J. A. Letter on Case of Continental Securities Co. v. August Belmont & Interborough Rapid Transit Co.; Brief Mar. 4, 1912, signed by *S. M. Yeaman*, sent to Law Reform Committee, Assn. Bar City of N. Y., Mar. 9, 1912.
HOOD, T. H. Colorado New Practice and Procedure Act "Unshackling the Courts"; Colo. St. Bar Assn. (1913) 283.
HOOK, W. C. The Struggle for the Simplification of Legal Procedure: 38 Amer. Bar Assn. (1913) 436.
HUDSON, MANLEY O. The Proposed Regulation of Missouri Procedure by Rules of Court: Univ. of Missouri Bulletin, vol. 17, No. 31.
ILLINOIS CONFERENCE. On the Reform of the Law of Procedure and Practice, 1911: Bill for act to amend act entitled "An Act in Relation to Practice and Procedure in Courts of Record," approved June 3, 1907, in force July 1, 1907, and all acts amendatory thereof, revision of Feb. 7, 1911, and revision

of Feb. 15, 1911. [President of Conference *E. B. Tolman*, Chicago.]

ILLINOIS STATE BAR ASSOCIATION. Report of Committee on Judicial Administration: Ill. St. Bar Assn. (1909), 95; (1911) 13.

Report of Committee on Law Reform: Ill. St. Bar Assn. (1910) 136; (1912) 271; (1913) 81; (1914) 24.

ILLINOIS, SUPREME COURT OF. A Statistical Review of the Work of the Supreme Court of the State of Illinois for ten years; July 1, 1900, to June 30, 1910. Compiled under Direction of the Court, Springfield, 1912.

JESSUP, HENRY W. Legal Efficiency: 4 Bench & Bar (n. s.) 55.

Report of Committee of Seven, Phi Delta Phi Club, N. Y. 1915.

Organization and Procedure of the Courts. Read to Academy of Political Science, N. Y., Nov. 19, 1914; published in Part I of Papers of State Constitutional Convention, *sub* Papers on Special Topics.

JOHNSON, J. M. Reform of Legal Procedure: Mo. St. Bar Assn. (1911) 92.

KALES, A. M. The English Judicature Acts: Ill. St. Bar Assn. (1913) 325.

A Comparative Study of the English and the Cook County Judicial Establishments: 4 Ill. Law Rev. 303.

A Proposed Judicature Act for Cook County, Illinois: 5 Ill. Law Rev. 265, 336.

Judicial Reorganization: 7 Ill. Law Rev. 119.

Reorganization of the Circuit and Superior Courts of Cook County: 7 Ill. Law Rev. 291, 218.

Proposed Amendments to the Municipal Court Act Relating to the Selection and Retirement of Judges. Chicago [n. d.].

Methods of Selecting and Retiring Judges in a Metropolitan District: The Annals, March 1914.

KANSAS. Small Debtors' Court: Bulletin VIII, American Judicature Society.

KEASBEY, E. Q. Judicial Procedure of New Jersey: 35 N. Y. St. Bar Assn. (1912) 934.

New Jersey Procedure—The Old and The New: 35 N. J. Law Journ. (1912) 170.

KEEDY, EDWIN R. Criminal Procedure in Scotland: Bulletin XI, Am. Inst. of Criminal Law and Criminol.

KEEDY, EDWIN R., AND LAWSON, JOHN D. Criminal Procedure in England: Bulletin IV, Am. Inst. of Crim. Law and Criminol.

KELLOGG, F. B. The Law's Delay: West Pub. Co.'s Docket, Sept. 1909, No. 6, p. 126.

KENTUCKY STATE BAR ASSOCIATION. Report of the Law Reform Committee: Proc. 1910, p. 198.

Report of Committee of Judiciary and Law Reform: Proc. 1911, p. 132.

KINKEAD, E. B. Reform of the Judicial System: 61 Ohio Law Bull. 231.
LACEY, ARTHUR J. Detroit Court of Domestic Relations: American Legal News, vol. 25, Sept. 1914.
LAMM, HENRY. The Law's Delay: Mo. St. Bar Assn. (1914) 241.
LANE, W. R. One Year Under the New Federal Equity Rules: 27 Harv. Law Rev. 629.
Working Under Federal Equity Rules: 29 Harv. Law Rev. 55.
LAW ASSOCIATION OF PHILADELPHIA. Report of Special Committee on the Judicial System of Philadelphia County, presented Dec. 3, 1912.
LAWSON, J. D. Judicial Administration and Legal Procedure, Remarks on: Mo. St. Bar Assn. (1911) 21.
LAWYERS' GROUP FOR STUDY OF PROFESSIONAL PROBLEMS. Memorandum on Simplification of Practice, 1917.
LEAMING, THOS. A Philadelphia Lawyer in the London Courts, New York, 1911.
LEHMANN, F. W. Conservatism in Legal Procedure: Okla. St. Bar Assn. (1908) 136; 18 Case and Comment, 649.
LETTON, CHARLES B. Law Reform in Nebraska: 3 Neb. St. Bar Assn. (1906–9) 252, 272–276.
LEWSON, JOHN. Porcedure Reform: 11 Ill. Law Rev. (1916) 268.
MACCHESNEY, N. W. A Plan for Modern Unified Courts: Tenn. St. Bar Assn. (1914) 103.
A Progressive Programme for Procedural Reform: 3 Jour. of the Inst. of Crim. Law and Criminology, 528 (1912).
MCDERMOTT, E. J. Delays and Reversals on Technical Grounds in Civil and Criminal Trials: Proc. Am. Pol. Sc. Assn. (1910) 97.
MCELREATH, WALTER. Justice Courts: Ga. St. B. A. (1910) 152.
MCMILLEN, A. B. New Mexico Practice and Procedure: 35 N. Y. St. Bar Assn. (1912) 946.
MCMURDY, ROBERT. Enforcement of Law: Ill. St. Bar Assn. (1914) 319.
Procedural Reform: 13 Mich. L. Rev. (1915) 667.
MACK, J. W. Remarks: Colo. St. Bar Assn. (1912) 160.
MACY, JESSE. The Efficiency of English Courts: McClure's Magazine, September, 1909.
MASSACHUSETTS BAR ASSOCIATION. Report of the Committee on Legislation (1915) 29.
MASSACHUSETTS COMMISSION to Investigate the Causes of Delay in the Administration of Justice in Civil Actions: Report, 1910.
MAYES, EDWARD. Mississippi Courts, 35 N. Y. St. Bar Assn. (1912) 902.
MELDRIM, P. W. Address [no title]: Mo. St. Bar Assn. (1911) 79,

MENDELSSOHN-BARTHOLDY, ALFRED. Einheit der Rechtssprechung Oesterreichisches Zentralblatt für die juristische Praxis, XXIX, 1.

MICHIGAN. Commission on Revision and Consolidation of Statutes, Report, 1914: Transmitting a Proposed Judicature Act.

MISSOURI BAR ASSOCIATION. Report of Committee on Judicial Administration and Legal Procedure: Mo. St. Bar Assn. (1910) 17; Mo. St. Bar Assn. (1911) 118.

Report of Special Committee on Judicial Administration and Legal Procedure: Mo. St. Bar Assn. (1912) 23.

Report of Committee on Judicial Administration and Remedial Procedure: Mo. St. Bar Assn. (1912) 21; (1914) 87.

Report of Special Committee on Judicial Administration and Remedial Procedure: Mo. St. Bar Assn. (1914) 124.

Report of Committee on Jurisprudence and Law Reform: Mo. St. Bar Assn. (1911) 116; (1912) 58; (1914) 121.

MISSOURI CODE COMMISSION. Report, 1914.

MOORE, G. W. and others. Quest of Error, Discussion of Judge Amidon's Article: Outlook, vol. 84, p. 258 (1906).

MORGAN, W. A. Courts and Civil Practice in Rhode Island: 35 N. Y. St. Bar Assn. (1912) 1006.

MUNICIPAL COURTS. See Annual Reports of the Municipal Courts of Chicago, Cleveland, Boston, New York, Philadelphia, Atlanta, Buffalo, and the Civil Court of Milwaukee: Allegheny County Court of Pittsburgh.

NATIONAL ECONOMIC LEAGUE. Preliminary Report on Efficiency in the Administration of Justice: Prepared by *Chas. W. Eliot, Moorfield Storey, Louis D. Brandeis, Adolph J. Rodenbeck, Roscoe Pound.*

NEWBOLT, FRANK AND ROSENBAUM, SAMUEL. The Rule Committee and Its Work: 40 Law Mag. & Rev. 129.

NEW YORK COUNTY LAWYERS' ASSOCIATION. Report of Special Committee on Constitutional Convention of 1915.

NEW YORK. Draft of Proposed Constitutional Provisions for the State of New York Relating to the Judiciary (March 10, 1915).

Association of the Bar of the City of: Committee to Consider the Simplification of New York Procedure, Report, 1909.

Final Report of the Commission to Inquire into Courts of Inferior Criminal Jurisdiction in Cities of the First Class: Albany, J. B. Lyon Co., 1910.

Report of the Municipal Court Commission, 1914.

NEW YORK CITY BAR ASSOCIATION. Report of Special Committee on the Judicial System of the State, 1915.

Report of Special Committee on Constitutional Conventions, 1915.

Committee on Criminal Courts and the Charity Organization Society of the City of New York.

Justice for the Poor (a report on changes in the organization of courts required by the exigencies of petty business), 1915.

NEW YORK STATE BAR ASSOCIATION. Report of Committee of Fifteen on Proposals to be laid before the Constitutional Convention, March 13, 1915.

Report of Committee on Law Reform: (1906) vol. 29, p. 355; (1907) vol. 30, p. 303; (1908) vol. 31, p. 184; (1909) vol. 32, p. 106; (1910) vol. 33, p. 73; (1911) vol. 34, p. 335.

Report of the Committee to Examine the Practice Act Prepared by the Board of Statutory Consolidation (1916).

NEW YORK STATE BOARD OF STATUTORY CONSOLIDATION. Report on a Plan for the Simplification of the Civil Practice in the Courts of that State (1912).

NORTH CAROLINA. Report of the Commission on Law Reform and Procedure: Historical Commission, Raleigh, N. C.

OLSON, HARRY. The Proper Organization and Procedure of A Municipal Court: Proc. Am. Pol. Sc. Assn. (1910) 78.

The Municipal Court of Chicago—A Tribunal of Procedural Reform and Social Service: Reprint from San Francisco Recorder, May 12, 1916.

Unification of Courts: Bethany College Bulletin (Lindsborg, Kansas).

PATTON, H. B. Pennsylvania Practice: 35 N. Y. St. Bar Assn. (1912) 994.

PERKINS, W. B. Procedural Law Reform: 10 Mich. L. Rev. 519. Proposed Remedies in Court Procedure: 12 Mich. Law Rev. 362.

PHI DELTA PHI. Report of Committee of Nine. Annals of Amer. Acad. Pol. & Soc. Science, September, 1917.

PHILADELPHIA. Committee of Seventy on Municipal Court: Explanatory Statement as to Municipal Court for Philadelphia.

PIGOTT, W. T. Practice and Procedure in Montana: 35 N. Y. St. Bar Assn. (1912) 927.

PILLSBURY, W. H. Experiment in Simplified Procedure: 3 Cal. Law Rev. 181.

PLEADING, Procedure and Practice in Federal Courts, Report of Committee on Judiciary, 1914: Bill by Mr. Clayton to authorize Supreme Court to Prescribe Forms and Rules and Generally to Regulate Pleading, Procedure and Practice on Common Law side of the Federal Courts, H. B. 133, Rep. No. 462.

POUND, ROSCOE. The Administration of Justice in the Modern City: 26 Harv. Law Rev. 302, 312.

Causes of Popular Dissatisfaction with the Administration of Justice: 29 Amer. Bar Assn. (1906) 395, 413.

Courts and Legislation: 77 Central L. Journ. 219.

Etiquette of Justice: 3 Neb. St. Bar Assn. (1908) 231.
Law and Equity in the Federal Courts—Abolishing the Distinction and other Reforms: 73 Central L. Journ. 204.
Practical Program of Procedural Reform: 22 Green Bag, 438; Ill. St. Bar Assn. (1910) 373.
Principles of Practice Reform: 71 Central L. Journ. 221.
Principles of Procedural Reform: 4 Ill. Law Rev. (1910) 388, 491.
The Organization of Courts: (Address before Law Assn. of Philadelphia, 1913): Legal Intelligencer, XXII, No. 6 p. iv; Rep. Minn. St. Bar Assn. (1914) 169.
Vesting in the Courts the Power to Make Rules Relating to Pleading and Practice: 2 Amer. Bar Assn. Journ. 46; Proc. Ohio St. Bar Assn. (1915) 33.
Regulation of Judicial Procedure by Rules of Court: 10 Ill. Law Rev. 163.

POWELL, A. G. Technicalities, So-called: West Pub. Co.'s Docket, Jan. 1909.

PROZESSREFORM. Vier Beitraege von *A. Mendelssohn-Bartholdy, G. Chiovenda, Roscoe Pound* und *A. Tissier:* Rheinische Zeitschrift für Zivil und Prozessrecht, II, Heft 4 (1910).

RALSTON, ROBERT. Report of Committee on Law Reform, 21 Pa. Bar Assn. (1915) 60 [on pp. 65–70 the Simplified Pleadings Act, passed in 1915, is set forth].

RAWLS, W. L. Maryland Procedure in Courts of Law: 35 N. Y. St. Bar Assn. (1912) 885.

REFORM OF PROCEDURE. Symposium on:—
Andrade, C. Jr.: The Commencement of Actions and other Proceedings up to Trial: 35 N. Y. St. Bar Assn. (1912) 203.
Battle, G. G. & Proskauer, J. M.: Preparation for Trial and Trial Practice: 35 N. Y. St. Bar Assn. (1912) 242.
Becker, N. D.: Judgments: 35 N. Y. St. Bar Assn. (1912) 325.
Cohalan, J. P. & Fowler, R. L.: Practice in Surrogate's Court: 35 N. Y. St. Bar Assn. (1912) 426.
Fiero, J. N.: Revision of the Code Relative to Special Actions and Special Proceedings: 35 N. Y. St. Bar Assn. (1912) 408.
Forster, H. A.: Satisfaction of Judgment and Supplementary Proceedings: 35 N. Y. St. Bar Assn. (1912) 392.
Riddell, W. R. Law and Practice in Ontario: 35 N. Y. St. Bar Assn. (1912) 451, 806.
Wheeler, E. P. Procedure on Appeal: 35 N. Y. St. Bar Assn. (1912) 354.

REFORM OF PROCEDURE. Symposium on: Report of Committee on Revision of the Civil Practice: 35 N. Y. St. Bar Assn. (1912) 437.

REGENNITTER, ERWIN L. The Court Rules of 1913 and the Supreme Court Rules of 1914: 18 Colo. St. Bar Assn. (1915) 131

REPRESENTATIVES, HOUSE OF. Hearing before Committee on Judiciary in Relation to H. R. 21455, H. R. 14552; H. R. 21455, Bill to Establish U. S. Court of Patent Appeals, etc.; H. R. 14552, to Regulate Judicial Procedure, etc. (as to Writs of Error and Appeals).

H. R. 24145, to Regulate Judicial Procedure of the Courts of the United States.

Bills S. 3749 & S. 4029, relating to Procedure in United States Courts.

RIDDELL, W. R. Administration of Justice: Ill. St. Bar Assn. (1914) 353.

American Courts as a Canadian Sees Them: 18 Iowa St. Bar Assn. (1912) 126.

RODENBECK, A. J. Reform of Procedure in the Courts of the State of New York: N. Y. St. Bar Assn. (1911) 354.

ROOT, ELIHU. Reform of Procedure: 34 N. Y. St. Bar Assn. (1911) 87; Addresses on Government and Citizenship, p. 431.

On Ending the Scandal of the Law's Delays: Addresses on Government and Citizenship, 177.

Courts of Justice for Small Causes: Addresses on Government and Citizenship, 185.

Reforms in Judicial Procedure: Addresses on Government and Citizenship, 467.

The Layman's Criticism of the Lawyer: 26 Green Bag, 471: 39 Rep. Am. Bar Assn. 336 (1914).

ROSENBAUM, SAMUEL. The Rule-making Authority: 63 Univ. Pa. Law Rev., 151, 273, 380, 505.

Rule-making in the Courts of the (British) Empire: Journ. of the Society of Comparative Legislation, N. S. No. 33, p. 128.

The Rule Committee and Its Work: 40 Law Mag. & Rev., 5th Series, 129.

The (English) County Courts: 64 Univ. Pa. Law Rev., 357, 472, 583.

Chancery Chambers in England Today: 11 Ill. Law Rev. 29.

Election of Judges, or Selection: 9 Ill. Law Rev., 489 (1915).

Rule-Making in the (English) County Courts: 31 Law Quarterly Review, 304.

SANBORN, J. B. Practice and Procedure in Wisconsin: 35 N. Y. St. Bar Assn. (1912) 1038.

SHELTON, T. W. Fixed Interstate Judicial Relations: Minn. St. Bar. Assn. (1914) 23.

The Reform of Judicial Procedure: 1 Va. Law Rev. (1913), 89.

Uniformity of Judicial Procedure and Decision: 22 Law Student's Helper, 5.

The Relation of Judicial Procedure to Government: 18 Case and Comment 654.

A New Era of Judicial Relations: N. Car. St. Bar Assn. (1916), not yet published.
Procedural Principles: Minn. St. Bar Assn. (1914) 23.
Simplification of Legal Procedure—Expediency Must Not Sacrifice Principle: 71 Cent. L. Journ. 330.
SIMS, HENRY UPSON. The Problem of Reforming Judicial Administration in America: 3 Va. Law Rev. 622.
SKINNER, T. K. Epitome of the Code of Civil Procedure of Missouri: 35 N. Y. St. Bar Assn. (1912) 906.
SMITH, A. W. Georgia Practice and Legal Procedure: 35 N. Y. St. Bar Assn. (1912) 844.
SNOW, THOMAS. The Waste of Judicial Power: 7 Law Quart. Rev. 256.
The Reform of Judicial Administration: 8 Law Quart. Rev. 129.
STOREY, MOORFIELD. The Reform of Legal Procedure (1911).
The True Position of the Judge: (Address before the Indianapolis Bar Association) published by the Association [n. p. n. d.].
STRONG, R. C. Practice and Procedure in North Carolina: 35 N. Y. St. Bar Assn. (1912) 950.
SUNDERLAND, E. R. The Michigan Judicature Act of 1915: 14 Mich. Law Rev. 273, 383, 441.
The Inefficiency of the American Jury: 13 Mich. Law Rev. 302.
TAFT, W. H. Administration of Justice—Its Speeding and Cheapening: 72 Cent. Law Journ. 191; Va. St. Bar Assn. (1908) 233.
The Delays of the Law: 18 Yale Law Journ., 28; 70 Albany Law Journ., 300.
The Selection and Tenure of Judges: 38 Rep. Am. Bar Assn. (1913) 418.
TENNEY, H. K. Procedural Reform: Ill. St. Bar Assn. (1912) p. 431.
THAYER, E. R. Judicial Administration: 63 Univ. Pa. Law Rev. 585.
THOMAS, C. S. Remarks: Colo. St. Bar Assn. (1912) 171.
TRABUE, EDMUND F. The Security of Judicial Tenure: Am. Law Rev., vol. 47, No. 5.
UNITED STATES. Message of President of, to Houses of Congress at Beginning of Third Session of Sixty-first Congress: Gov't Printing Office, 1910.
VANCE, W. R. Legal Reforms in Perspective: Mo. St. Bar Assn. (1913) 239.
WELLS, FRANK. Justice and Procedure: Okla. St. Bar Assn. (1914).
WERNER, PERCY. Voluntary Tribunals; a Democratic Ideal for the Adjudication of Private Differences which Give Rise to Civil Actions: Mo. St. Bar Assn. (1914); Kansas City Bar Monthly, June 1914.

WHEELER, E. P. American Bar Association's Recommendations as to Judicial Procedure: 32 N. Y. St. Bar Assn. (1909), 32.
Procedure on Appeal: 35 N. Y. St. Bar Assn. (1912) 354.
Reform of Judicial Procedure: Chicago City Club Bull., vol. 2, No. 34 (1909), 405.
Reform of Procedure in the Courts of New York: 35 N. Y. St. Bar Assn. (1912) 347.
Reform in Legal Procedure from the Practitioner's Standpoint—A Review of the New Jersey Act of 1912: 75 Cent. Law Journ. 144.
Procedural Reform: 18 Case and Comment 661.
WHIPPLE, SHERMAN L. The Duty of Disclosure: Address before Fla. St. Bar Assn. 1913.
The Impairment of Popular Confidence in the Administration of Justice: Conn. St. Bar Assn. (1914) 62.
WHITE, E. J. Reform of Judicial Procedure: Mo. St. Bar Assn. (1914) 55.
WHITTIER, C. B. Judge Gilbert and Illinois Pleading Reform: 4 Ill. Law Rev. 174.
WIGMORE, JOHN H. The Qualities of Current Judicial Decisions: 9 Ill. Law Rev. 529, March 1915.
WILSON, C. B. Brief Statement of the Law of Pleading and Practice in the District of Columbia: 35 N. Y. St. Bar Assn. (1912) 834.
WINCH, L. H. Ohio Code of Civil Procedure: 35 N. Y. St. Bar Assn. (1912) 983.
WINSLOW, J. B. Enforcement of Law: One Way to Make it Better: Ill. St. Bar Assn. (1914) 383.
"An Understanding Heart." Does the American Judge Possess It?: The Survey, Oct. 4, 1913.
The Problem of Nonpartisan Judicial Reform: Kan. St. Bar Assn. (1914) 41.
WINSTON, R. W. Popular Discontent with the Courts: N. Car. St. Bar Assn. (1913) 25.
WISCONSIN. Report of Joint Committee of the Legislature of Wisconsin on Investigation of the Organization and System of Courts in Wisconsin. Madison, 1915.
WOODS, C. H. Practice and Procedure in Oklahoma: 35 N. Y. St. Bar Assn. (1912) 988.
YOUNG, C. B. Practice and Procedure in Vermont: 35 N. Y. St. Bar Assn. (1912) 1011.

SOME OBSERVATIONS UPON THE REPORT OF THE COMMITTEE OF THE PHI DELTA PHI WITH SPECIAL REFERENCE TO THE TYPICAL JUDICIARY ARTICLE FOR A CONSTITUTION

By Charles A. Boston,

Chairman of the Committee of Professional Ethics of the New York County Lawyers' Association, New York City.

The Committee has extended to me the esteemed privilege of making some discursive observations upon its recommendations, especially with reference to its proposed constitutional article.

The Lawyer's Attitude toward the Conventions of His Profession

The New Republic, in commenting recently upon a distinguished lawyer, said: "Nor did Mr. ——— have that kind of intellectual curiosity which gives a lawyer a critical attitude toward the conventions of his profession." The truth is that this is almost a universal failing of the legal profession: the conventions of the profession too often permit and promote an attitude of tolerance for iniquities under the guise of law, which enthral the community and defeat the litigant unjustly.

Another truth is that in many of its features the law as administered defeats the achievement of just results, through its unnecessary formalism and its unnecessary adherence to ancient and outworn conventions, the most of them the result in one shape or another, of ancient methods of thought among lawyers,—lawyers elevated to judicial position, or lawyers acting as or for legislators. In these aspects this law is an inadequate instrument, not adapted to the needs of a modern civilized community with progressive aspirations. Laymen cannot be expected to remodel law, but they justly criticize many of its features; and they justly censure the legal profession for not using its knowledge and its influence to remodel laws to accomplish just results in operation. It may not be the *duty* of the legal profession as such to conceive the iniquity of

law or to work for its improvement; but it is its *opportunity* to do so, and on the other hand, it can lend its influence to perpetuate unjust methods or unjust institutions in the administration of public justice through the courts.

My observation leads me to the belief that existing laws fail to accomplish just results through the survival and enforcement in the courts of formal laws or formal rules without due regard to the purpose for which they were devised, or through the survival and enforcement of laws not adapted to present-day views of justice.

By way of general indictment but without specifications, I should say that those elements of law which contribute most largely to produce unjust or discouraging results are: a technical and elaborate practice, technically pursued; an antiquated and unreasonable system of evidence which is so administered as often to exclude the very best attainable evidence of a fact, which is accepted as such evidence everywhere outside of a court room by reasonable men; and a tenacious and idolatrous adherence to a civil jury as an agency in determining litigated matters.

Lawyers cling to these institutions fanatically in the most cases without even an inquiry in their own minds as to whether the machine of which they are a part performs well the civic duty that is its sole justification for being.

THE AWAKENING OF BODIES OF LAWYERS

It is most pleasing, therefore, to note that at present throughout the country lawyers, in various associated forms, are appreciating the justice of popular dissatisfaction and are themselves applying their experience and their intelligence to meeting a real public need.

WHAT IS WRONG WITH LAW AND LAWYERS?

In endeavoring to formulate in my own mind the relations in which existing law as administered seems to me to fall short, I have thought that the failings and their remedies in law reform could be effectually discussed in the four categories: law and injustice, law and trickery, law and absurdity, the game of evidence. Wherever the application of law systematically produces injustice, or promotes trickery in its administration, or perpetuates inherent absurdity, and wherever the admissibility of evidence becomes itself a game apart from the conscientious endeavor to ascertain the truth of a

dispute and its actual merits within the law, there the institution of judicial machinery fails of its rational purpose.

There is a widespread sense of soreness at the administration of justice in the courts. It behooves those who are conscious of the fact to try to eradicate the cause and either to disabuse the public mind if it is in error, or to rectify the evil if it actually exists.

The report of the committee directs attention to the quotation from *The Man in Court* that "During the trial a feeling of resentment of court procedure grows." This feeling is the natural repugnance to a machine, which, inaugurated for reaching just results, proceeds by a method which, to the popular mind, appears to make such results impossible. It is this natural resentment which contains the seeds of reform and it should not be laughed to scorn, for it arises out of human *habits* of thought and is based upon a justifiable impatience with seeming injustice.

It is by no means true that "Whatever is, is right." The history of judicial administration, like the history of all other human institutions, is a history of abuses. And as I, from reflection, have tried to place into categories the recognizable shortcomings of law and its administration, I have felt that a good beginning is made, when it is pointed out that, occasionally at least, law deliberately permits injustice, deliberately promotes trickery, is deliberately absurd, and deliberately shuts the door to the ascertainment of truth. When one discovers this fact, he naturally asks the question: Is this a necessary adjunct of law, or is it merely the result of indifference, or ignorance, or selfishness? In a measure it is the combined result of all three.

To discuss each of these categories of shortcoming and to point out specific instances would swell these observations beyond their essential limit; but with them in mind, I shall approach the specific questions to which I am now limited.

THE ACTIVITY OF CERTAIN BAR ASSOCIATIONS

It may not be inopportune, however, to point out that the San Francisco Bar Association has instituted a committee styled the General Welfare Jurisprudence Committee, whose powers are defined in the resolution for its institution, and are as follows:

to consider the matter of the local bar associations providing practical means for the coördinate consideration by laymen and members of the legal profession of the

problems involved in the enactment, administration and enforcement of the law, and also in striving for a better understanding of and obedience to and betterment of the law as an instrumentality for justice and the welfare of all, and to report from time to time as such committee may see fit either to this association or to other organizations and to seek the aid and coöperation of other organizations in such work of the committee and all matters incidental thereto.

It were well, it seems to me, if every bar association in the country had such a committee, charged with the duty of assimilating the law and its administration to the real needs of the people with a view to limiting injustice, eliminating the trickery of practice, pruning out the unnecessary absurdities of an inherited law, and so remodeling the accepted law of evidence as to admit of a wider search for truth.

The American Bar Association, through its special committee on coöperation between bar associations, of which I am a member, has already planned that, one of the topics for discussion at the conference of delegates from state and local bar associations at Saratoga Springs on the first Monday of September, shall be, "The Elimination of Anachronisms in Law."

ANACHRONISMS IN LAW

Such anachronisms are illustrated by the importance given to a scroll or other form of seal, as essential to the validity of a deed, or of a bill of exceptions, or as conclusively or otherwise importing a consideration, or as extending the period of limitations, or as shifting the burden of proof.

These concepts do not enter into the daily habits of the community in its transactions and they are, therefore, merely legal pitfalls for the unwary. Another such pitfall is the necessity of fixed formulae such as "heirs and assigns" as essential to produce specific results. It is wholly unnecessary for present purposes to elaborate the illustrations. The bar found these concepts as inheritances; it was educated in their sanctity. These or similar notions are a part of the essential preparation of lawyers, and the vast majority of them are willing to accept them as unchanging features of an established order, received from antiquity to be transmitted to posterity, regardless of the fact that they are or should be non-essentials, and that their perpetuation frequently promotes injustice by giving an undue advantage to the crafty and designing.

Similar non-essentials everywhere unduly clutter the existence of just law, and the just administration of law. When we scan the present situation we find that the promotion of just results through the administration of law in litigation, demands a scrutiny and a challenge of laws, both substantive and procedural.

PROCEDURAL REFORM

In this present article the procedural is first to engage our attention, and in particular the recommendations of this one committee of the Phi Delta Phi fraternity.

I desire at the outset to emphasize my own view that the reformation of procedure is but one aspect of the opportunity which lies before the lawyer. It is an unfortunate fact that the education of the lawyer makes against his participation in legal reform. His education is a process of initiation into the mysteries of the law as it is; he is introduced into an existing system, and for admission to its practice, he must know it as it is, and not as it ought to be. There is therefore no incentive, save intelligent citizenship, superior to the mysticism of professional order, which prompts him to any active participation in legal reform.

The public benefit, which can be conferred through the activity of initiation manifested in such bodies of lawyers as this committee of the Phi Delta Phi, is inestimable. It is such activity which overcomes the inertia of professional satisfaction in that great mass of the profession, which, being of necessity condemned to earn its livelihood through the law, is eminently content to see the law administered as it is, and not as it should be, and is content to trim its sails to meet the winds of an established order, without questioning whether in righteousness they ought not to blow otherwise.

The report itself adequately argues the advantages of ideals. Let me point out, however, that ideals have two bases: ideals of results, and ideals of methods. The ideal of results should be the primary ideal, and it necessitates a scrutiny of substantive as well as remedial law, and of all procedural law as well as the law of judicial organization.

To my mind, the essential ideal of procedural law is that it should be so framed as to assure to litigants the disposition of their controversies with proper regard to their actual right, after an adequate opportunity to be heard upon the merits; and specific methods

conserving these results should be framed from the public and not from the private standpoint. So considered, no litigant should have a vested right in a method; and consequently appeals for errors of practice should be unknown unless the alleged error can be reasonably certified by counsel to have deprived the litigant of substantial rights without due process of law. In other words, errors of practice should be measured, not by the inquiry whether some standard of procedure was or was not observed, in interlocutory matters, but whether such procedure deprived a litigant of a fair opportunity to present the merits of his cause or defense.

The fault of all statutory procedure seems to me to be that the courts in administering it seem to regard it as conferring rights upon parties, whereas it should be regarded as the definition of a rule of convenience.

The report deals specifically with matters in New York State, and my discussion and observations will have that fact in mind. Under a statute of New York, in the Marine Court (now City Court of the city of New York) a statutory form of summons required an appearance and answer in ten days after service in certain cases. This is a rule of convenience; it is reasonable that it should be uniform. But what reasonable justification is there for the judicial concept that a summons requiring an answer in a different number of days is void judicial process? Yet it took a judgment of the Court of Appeals reversing the general term of the Court of Common Pleas (itself an Appellate Court) to determine that such a summons was not a nullity.[1]

It is the fact of intellectual slavery in judicial mentality under a detailed statutory procedure which demands that such procedure must be liberal and the merest skeleton. It may well be that the judiciary would adopt as a measure of convenience every existing rule of the present Code of Civil Procedure, with its thousands of sections, but judicially adopted they should be what they always ought in the main to be—merely rules for expedition and order, instead, as now, of being the inflexible rules of a complicated game in which the remedy is the thing played for. Too frequently, the merit is utterly lost to view. Of what earthly moment, except to suit convenience, is the question whether in a given case, a notice of trial is given or an order to show cause is returnable at the opening

[1] *Gribbon* v. *Freel*, 93 N. Y. 93.

day of a term or later. Yet I have myself been of necessity engaged in serious and substantial litigation before an appellate division in which that question was further complicated by the fact that the appointed day for opening fell upon a public holiday and the court was not actually there in session.[2]

The variety of ways in which such questions actually arise in practice from a statutory procedure which the courts deem themselves under the obligation of law to observe, passes imagination of man to number. Such being the case, what is a man who has his eyes upon the merits of the dispute and the great public convenience to do? He should, in the interest of public and litigant alike, agitate for a practice framed upon the theory of convenience and flexibility, instead of upon the theory of a vested right in a method of procedure, conferred by law upon every litigant. Rules of parliamentary law, so-called, are accepted by deliberative bodies, for convenience and order, but what person would seriously advocate the proposition that the actual vote of a deliberative assembly could be invalidated by some mere breach of parliamentary procedure in reaching a vote?

Yet this is practically the nature of almost every controversy today in New York upon appeals from interlocutory orders, which are permitted and taken by the thousand. And it seems to the average New York lawyer to be of the very essence of liberty itself that at least one appeal should be allowed from every interlocutory order, whereas in the federal jurisdiction such appeals are wholly unknown unless they involve an application for an injunction.

Let us consider the public purse for an instant. Appeals from interlocutory orders always represent a large percentage of the appeals to the appellate division in New York City.[3] Think of the vast aggregate of costs, counsel fees, printing expenses, and expenses of the judicial establishment, which could be avoided if the state practice were assimilated to the federal practice. The federal practice is, so far as I know, completely satisfactory in this respect, yet the average New York lawyer is terrorized at the mere mention

[2] For illustrations of similar litigation over mere mistakes of practice in which, however, the courts gave a liberal interpretation of the law, see *Bander* v. *Covill*, 4 Cowen (N. Y.) 60, *Jackson* v. *Brownson*, 4 Cowen (N. Y.) 51, *N. Y. Central Ins. Co.* v. *Kelsey*, 13 How. Pr. (N. Y.) 535, *Douw* v. *Rice*, 11 Wendell (N. Y.) 180, *McCoun* v. *N. Y. C. & H. R. R. Co.*, 50 (N. Y.) 176, in re Flushing Ave., 101 N. Y. 678, *Whipple* v. *Williams*, 4 How. Pr. (N. Y.) 28.

[3] Approximately 40 per cent, as I understand.

of the assimilation. And when I have asked why, I have always had the same answer: We cannot trust the judges with such vast power without the right of review!

And so the existence of such a meticulous and detailed legislative law of mere method begets a distrust of the very judiciary itself, and thus has sprung up a vast body of interlocutory litigation, expensive and tedious, to discover not which of the parties has the stronger right, but whether the umpire proceeded according to the rules of the game!

Personally I have no hesitation in declaring that the public interests *demand* the immediate abolition of all interlocutory appeals, except in cases granting or refusing injunctions, attachments of property, or arrest of persons, where the postponement of the appeal would or might work serious injury.

And this prompts me to formulate the ideal of litigation from the standpoint of the litigant: one trial upon the merits after adequate opportunity for preparation, speedy, just in its methods, inexpensive, in a court of unlimited powers to administer the whole law of the land applicable to the dispute; and one appeal for the *correction* of substantial errors, and not merely for the *discovery* of such errors.

CONCILIATION

There is, however, to my mind an additional public ideal which can be realized through a court properly organized and conducted. It is to the public interest not only that there should be an end of dispute, but also that no dispute should be submitted to the ordeal of a real trial unless it is of such nature as really to merit it. I am advised that in Scandinavian countries, attempt at conciliation is a necessary preliminary to trial, and that in consequence the cases reported for trial do not exceed 10 per cent of the suits brought. I have no personal knowledge of the procedure nor of the statistics.

The Constitution of 1846 in New York provided for the institution of a Court of Conciliation,[4] but the time did not seem to have been ripe and it became a dead letter, to be eliminated in 1894.[5]

I do not see but that the time of one or more judges or masters might be profitably employed in sifting the true merits of all litiga-

[4] New York Constitution 1846, Art. VI, s. 23. See Report New York State Bar Association for 1916, Vol. XXXIX, pp. 304, 305.

[5] Cf. New York Constitution 1894, Art. VI.

tions in the presence of the parties, with or without their legal counsel, explaining to them the law as applied to the matters in dispute, not advising a compromise, but predicting the probable legal outcome upon the merits as they appear, without prejudice upon the actual trial, if any ensues.

THE CONTINGENT FEE

The allowance of speculation in litigation by lawyers, for a share of the recovery, has greatly aided in the increase of unmeritorious litigation and the consequent imposition of expense in the maintenance of courts. The interposition of some interlocutory inquiry into the reasons for the institution of the suit, whether and to what extent solicited or promoted by the lawyer interested in a contingent fee, and some justification on the ground of inability or otherwise, for permitting a contingent fee or fee for a share of the recovery, similar to the inquiry for permission to prosecute *in forma pauperis* would tend to confine such litigation within the limits of the ground upon which such contingent fees are always justified,—in argument,—the poverty of the litigant. The truth is that the public interests are too little supervised to discourage the volume of unmeritorious litigation. The report well indicates, by its quotations in respect to the English practice, how unmeritorious litigation is there sifted out at early stages.

DEFECTIVE LAWS OF EVIDENCE AND THE CIVIL JURY

I would be untrue to my own convictions if I should omit to mention the part which unreasonable laws of evidence and an unreasoning and superstitious attachment to the civil jury play in defeating the true ends of justice in litigation.

The devotion of our judiciary to the principle *stare decisis* has engrafted upon our law the perpetuation of judicial error, unless corrected by the legislature. The consequent consideration of precedent as establishing law has made the ascertainment of law at any given moment the process of impressing upon the judicial mind, in any controversy, a composite photograph of all previous judicial decisions "from whatever source derived." It may not be very difficult to grasp and apply a fundamental judicial concept, but when its application is to be derived not from its obvious relation to the particular dispute, but by reference to the application of

every aspect and modification of it, to every known state of facts which the industry of every reporter has been able to cull from all known sources, then the resultant is too apt to present about as much resemblance to the true type, as the composite photograph does to any individual of the group of which it is composed.

THE LAW OF EVIDENCE

Our law of evidence is almost wholly of judicial origin. With a few exceptions—disastrous, it is true, in their results—the judicial mind has had freer constructive play in elaborating and engrafting the law of evidence than in any other field of constructive judicial activity. As a result the treatises upon the law of evidence are among the most numerous and voluminous to be found in our law libraries, and the results are the most unsatisfactory in their uncertainty, as well as in the particular pointed out in the report, that they offend the intellectual sensibilities of the average intelligent man who properly thinks that the rules exclude much that makes for the ascertainment of substantial truth.

The judicial concept that no man could properly be heard to testify in a dispute in whose result he was interested, became engrafted on our law through the rule *stare decisis;* it became so much a part of the law that it required legislative interference to correct it and it still so far lingers that the superstition still prevails that public good can be achieved by excluding all evidence of the transactions of an interested party with a deceased person, even when the evidence consists of writings in the undisputable handwriting of the decedent coming from the custody of the person whose mouth is shut. Legislative interference, as judicially construed, with the common sense rules of the common law, in extending unreasonably the privilege of communications with an attorney and his employes, and in creating privilege for communication to a physician, trained nurse and the like,[6] has led to obvious absurdities having no foundation in basic reason, but being grounded merely upon debatable judicial constructions.

Upon every occasion when such absurd and unintended result follows upon a debatable judicial determination at least of a court of last resort, it becomes a part of the law of the land essentially incapable of change, except by additional and possibly abortive legislation.

[6] New York Code of Civil Procedure, ss. 835–836.

These statutory rules of privilege[7] are, as extended by the legislature, grounded in sentimentality, deliberately framed to prevent the ascertainment of truth from these sources. As judicially construed, they extend the legislative intent beyond what, it can be fairly argued, was the limit of that intent; and it shuts the door to the ascertainment of the actual truth. In practice it has produced some of the most absurd results; such for instance as that while a physician must publicly certify the cause of his patient's death before the issuance of a burial certificate is permitted, yet he will not be heard to testify to the same already disclosed fact in a court of justice, nor can his certificate, filed pursuant to law in a public office, be used as proof of the fact.[8]

A like absurdity is illustrated by the anomaly that a physician, who with the consent of his patient had publicly exhibited him and lectured upon his ailment and had published a descriptive article about it, was not permitted to testify to the same publicly heralded conditions in a law suit.[9]

When such situations come to light, they are unjustifiable absurdities to any candid citizen, whether he be layman or lawyer. And when one picks up such a book as Wigmore's *Manual of the Law of Evidence*, and sees page after page containing bracketed matter indicative of what the logical law ought to be, but is not, with occasional references to the "New York quibble" or the "Massachusetts quibble,"[10] he must be impressed as a good citizen that there remains much to be done by intelligent lawyers to bring the machinery of courts into efficient functioning to produce just results.

THE CIVIL JURY

I have spoken of the civil jury. I shall content myself with the statement of my personal conviction that no more persistent barrier to the achievement of a just result could be conceived by a malignant enemy of mankind, than the civil jury system as administered in

[7] New York Code of Civil Procedure, ss. 833, 834, 835, 836.

[8] See discussion—Witthaus and Becker's *Medical Jurisprudence, Forensic Medicine and Toxicology*, 2nd Ed., 1906, Vol. I, pp. 106, 141, 169, 170, 125 *et seq.*; *Buffalo L. and T. Co.* v. *Masonic Mutual Aid Assn.*, 126 N. Y. 450; *Robinson* v. *Supr. Com.*, 38 Misc. (N. Y.) 97: 77 App. Div. N. Y. 215. *Davis* v. *Supr. Lodge*, 165 N. Y. 159; *Beglin* v. *Metr. L. Ins. Co.*, 173 N. Y. 374.

[9] *Scher* v. *Metr. St. Ry. Co.*, 71 Ap. Div. (N. Y.) 28.

[10] *E. g.* Wigmore, *Manual of Evidence*, s. 1434, p. 325.

practice. We hamper it as a popular tribunal by limiting the evidence which it may consider, and by instructing it unintelligibly concerning the law which it is to apply. Then we let its uneducated prejudices produce the results, and point to them with superstitious pride, while we erect alongside of it, another system, that of equity, in which the worshipped jury plays no calculable part. Yet with a straight face, and with a legal mind apparently all unconscious of inconsistencies, we praise both systems as having an equal claim to our admiration.

A CHALLENGE TO LAWYERS

I have thus generalized because of my conviction that the legal mind itself needs working up to a challenge of the efficiency of the system which as a body it is content to administer. And also to urge that, if not a duty, it is at least a civic opportunity which confronts the legal profession, to measure the entire system by its results, not with a view to destruction, but with the opposite purpose of construction, so that the glaring inadequacies of the existing system may be rectified through the advice of those who, from experience and education, are best qualified to apprehend and effect.

These thoughts, however, have only a suggestive relation to the immediate question now in hand, which is the proposed model judiciary article for a state Constitution recommended for New York State by the Committee of the Phi Delta Phi, but typical in its nature of any ideal judiciary article.

THE PROPOSED JUDICIARY ARTICLE

When analyzed, I find that the proposed article contemplates in substance the lodgment of the entire judicial power of the state with two specific exceptions, political impeachments and justices of the peace, in a single judicial establishment with elasticity of branches, both for trials and appeals, with an elective chief justice who shall have a supervised power to fill judicial vacancies, such judiciary to be self-disciplining, as well as subject to impeachment, and with ample powers within itself for all proper administrative machinery and with power to designate masters and delegate to them certain inferior judicial duties, to admit to the bar and to designate a disciplinary body for supervision of bench and bar.

The simplicity of this statement seems to me to be captivating;

the proposed unified court appears in substance to be sufficiently comprehensive in its organization; its method of selection seems to me to be justified by the argument in the report; and every proposition advanced in the report in respect to the article seems to me substantially sound. A scrutiny of the respective articles and the committee's arguments or explanations, suggests, however, the following additional observations.

AN IDEAL JUDICIARY ARTICLE

A constitution in its judiciary article should not be an inflexible mold, into which the judiciary of the state is poured once for all, but it should contain in its own provisions, recognition of the fact that the state itself should be expected to grow, and that the necessities and ideals of the people can be expected to change, and it should not require a change of the Constitution to equip the judiciary to meet changing needs. The constitution should not be like the crab shell or the snake skin which must be completely cast to meet the necessities of the living organism which it protects and shelters, but it should rather be like the human integument which unconsciously expands from day to day with the natural growth of the individual whose outward measure it is. Or, if we compare it to a mechanical device, it should be like a ratchet wheel which secures against retrogression, but is ever ready to be released to admit of progress. For this reason it should never be too rigid in its requirements. The proposed article seems admirably framed to meet this suggestion.

THE JUDICIAL POWER

"The judicial power," with two exceptions,[11] is to be lodged in the court. This is, in my opinion, a proper definition of the jurisdiction of such a court. It has been the practice heretofore to limit the jurisdiction by reference to the courts of common law and equity in England. The present Supreme Court of New York has by the Constitution general jurisdiction in law and equity,[12] as though that exhausted the exercise of the judicial power. But it does not. There was a large judicial power in England, recognized at common law, but vested in administration in the ecclesiastical courts; not

[11] Sec. 1.

[12] Art. V, s. 1.

to speak of the jurisdiction in admiralty, and prize jurisdiction, which is probably not within the present sovereign power of the state. In the early days of New York under the decision of Chancellor Kent, in *Wightman* v. *Wightman*,[13] certain ecclesiastical jurisdiction was said of necessity in a civilized community to have devolved upon the Court of Chancery in New York, though not exercised by the Court of Chancery in England. Upon that decision, a doctrine has been widely adopted in this country, that such jurisdiction necessarily devolved upon American courts exercising chancery jurisdiction.[14] Of late, however, the tendency has developed in New York courts to deny Chancellor Kent's contention[15] so that the anomaly is presented, through the arguments or dicta of these later decisions, of a judicial power in abeyance because it is neither law nor equity. The jurisdiction, instead of being found in the lodgment of judicial power, is sought through the legislative creation of judiciable controversies arising out of defined states of facts. In other words, and for example, instead of the Supreme Court as a Court of Equity having inherent jurisdiction to pronounce by judicial decree, operative upon the parties and all claiming under them, a marriage invalid which was void in its inception for whatever cause (a jurisdiction exercised by the ecclesiastical courts in England) that jurisdiction is held to be in abeyance in New York, except in those specific cases in which the legislature has by general law conferred the right to litigate upon the parties. It is far more reasonable to lodge "the judicial power" of a state in a court, than to limit its exercise to those cases which in England were cognizable in the courts of law or equity. In England the jurisdiction of equity was capable of growth and enlargement in harmony with the fundamental principles of equity and jurisprudence. Prior to April 19, 1775,[16] many notable instances of the deliberate extension of such

[13] 4 Johnson, Ch. R. 343.

[14] Stewart, *Marriage and Divorce*, ss. 139, 140; *Perry* v. *Perry*, 2 Paige Ch. (N. Y.) 504; Anonymous 24 N. J. Eq. 19; *Selah* v. *Selah*, 23 N. J. Eq. 185; *Hawkins* v. *Hawkins*, 38 So. Rep. 640 (Ala.); *Norman* v. *Norman*, 54 Pac. R. 143 (Cal.); *McClurg* v. *Terry*, 21 N. J. Eq. 225; *Waymire* v. *Jetmore*, 22 Ohio St. 271; *Powell* v. *Powell*, 18 Kan. 371; *Johnson* v. *Kincade*, 37 N. C. 470; *Clark* v. *Field*, 13 Vt. 26 Cyc. 900.

[15] *Davidson* v. *Ream*, N. Y. App. Div. 3rd Dept., May, 1917; *Stokes* v. *Stokes*, 198 N. Y. 301; *Walter* v. *Walter*, 217 N. Y. 439.

[16] See New York Constitution, Art. I, s. 16, fixing this date as the date upon which the common law of the Colony of New York crystallizes.

jurisdiction are to be found, even in situations in which in order to assume the jurisdiction it became necessary to overrule the views of a prior chancellor.[17]

But where the jurisdiction of a court of general powers is constitutionally defined as "general jurisdiction in law and equity," the judicial interpretation of such definition is altogether too apt to be limited to rigid conformity with the jurisdiction of the High Court of Chancery as historically assumed on April 19, 1775. This has been the case with the subsequent treatment in New York of the great principle of equity jurisdiction announced by Chancellor Kent in the leading case of *Wightman* v. *Wightman*. The Chancellor there argued that it is essential to the best interests of a civilized community that during the life of two persons apparently married, some court should be inherently vested with the power to adjudicate their relation to each other, not as an incidental or merely collateral matter, which only affects the parties to the specific suit—such as a suit at law against the putative husband, by a third person, for his alleged wife's necessaries—but in a plenary suit between the alleged spouses to decree what their status really is, whether married or unmarried. The Chancellor, while recognizing that Courts of Equity had not exercised this power in England because it was vested in the ecclesiastical courts, nevertheless concluded that as there were no ecclesiastical courts in New York, the jurisdiction devolved upon the judicial establishment as a necessary incident of civilized society, and that the fundamental constitution of the Court of Chancery was such that it could best exercise the jurisdiction. Hence the court had such jurisdiction and he as Chancellor should assume it. This view was followed by Chancellor Walworth in *Perry* v. *Perry*.[18]

But since that date, although, as I have already stated, this determination properly stands as the foundation stone in a well recognized branch of equity jurisdiction in several states,[19] the New York courts, bound by the concept of "*equity* jurisdiction," have repeatedly denied the great principle recognized by Chancellor Kent and Chancellor Walworth, and have explained that the specific cases in which they acted had peculiar features, such as lunacy,

[17] See "The Enforcement of Decrees in Equity," Huston, *Harvard Studies in Jurisprudence* 1, Chap. V, VI.

[18] Paige Ch. (N. Y.) 504.

[19] *Supra*, p. 117.

infancy, fraud or duress, which were themselves sufficient justification for the exercise of an inherited equity jurisdiction, without recourse to the great general principle, that in any case, where the validity of a marriage was in doubt it was an inherent part of equity jurisdiction that either of the putative spouses could bring a bill against the other to determine their status in relation to each other.[20]

It has crippled the efficiency of the judicial system established by the present constitution for the courts themselves to have so construed the grant or definition of jurisdiction of the Supreme Court (continued as a court of general jurisdiction in law and equity)[21] as to limit its jurisdiction in equity to those particular instances in which it can be demonstrated by reference to actual precedents that prior to April 19, 1775, the Court of Chancery in England granted relief. This has the effect of pouring the court into a mold of the precise limits of 1775 without giving it an opportunity to grow with the judicial needs of the people, save in so far perhaps as the legislature may in specific cases—as it has done in certain classes of matrimonial actions—grant rights of action, which can then be administered in a court. This result, recognized by the courts, as growing from a legislative act, presents the illogical anomaly of a judicial power arising from legislative action, instead of a judicial power inherent in a constitutional grant.

The same rigid concept was unfortunately written into the Constitution of the United States[22] so that, by reason of the early, perhaps unnecessary, judicial concept of the effect of the use of the words law and equity,[23] it seems to have become eternally impossible in the federal courts to adopt the approved modern practice of administering all the law of the land applicable to a given state of facts, in the same suit, whether by the practice of England in 1776 it was cognizable and administrable partly at law and partly in equity. Only recently have our national legislators, after nearly one hundred and forty years of national life, seemed to discover that it is not impossible, within the Constitution, to make the practice

[20] *E.g.* see language of Sanford Chancellor in *Ferlat* v. *Gojon*, 1 Hopk., 541; *Burtis* v. *Burtis*, 1 Hopk., 557.

[21] New York Constitution 1894, Art. VI, s. 1.

[22] United States Constitution, Art. III, s. 2.

[23] *United States* v. *Howland*, 4 Wheat (U. S.) 108, 115.

more flexible, in spite of the unfortunate reference to law and equity as rigid systems, in the Constitution.[24]

It is therefore highly desirable that in a typical constitution we should abandon references to "law and equity" as defining the jurisdiction of courts, and lodge the *judicial power* in the judicial establishment, with such exceptions, if any, as may be deemed wise. A judicial power, not exercisable by the judicial establishment, is an unjustifiable anomaly.

JUDICIAL POWER OF EXECUTIVE AND ADMINISTRATIVE AGENCIES

There is another reservation, which perhaps should be inserted in section 1, so as not to embarrass either legislative or executive branches in the proper performance of their duties. It might be successfully contended that section 1 lodges the whole judicial power in the judicial establishment, and therefore that no judicial power can be lodged or exercised elsewhere. What is the power now exercised by boards of tax assessors in reviewing assessments to ascertain over-valuation and inequalities? What is the power exercised by condemnation commissioners in appraising values and assessing benefits for public improvements? What is the power exercised by workingmen's compensation commissioners in ascertaining facts upon which to award compensation?

In a recent very exhaustive opinion of a deputy attorney general of the state of New York it has been made to appear that he considers by reason of many decisions of the courts themselves, that in so acting the board of assessors is a "judicial body."[25] If so, is it exercising "judicial power?" It must be that a judicial body exercises judicial power in performing the duty which makes it a judicial body. But if so, then the present proposed section 1 would make it impossible for the legislature to give a board of tax assessors power to correct its previous erroneous assessments upon an investigation conducted by the taking of evidence. If the taking of evidence to reach an authorized result constitutes the investigating officers a judicial body, as seems to be the burden of the decisions

[24] U. S. Judicial Code, ss. 274 a, 274 b, as added by Act of Congress, March 3, 1915, ch. 90; see Federal Equity Rules XXII and XXIII, promulgated November 4, 1912.

[25] Opinion of Deputy Attorney General Smith in matter of L. Tanenbaum, Strauss & Co., Inc., 1917.

upon which the deputy attorney general bases his view that a board of tax assessors is a judicial body, then it seems that to avoid an embarrassing curtailment of the powers of administrative functionaries, section 1 should have a saving clause, substantially as follows:

"But executive or administrative officers or functionaries may be vested by law with such judicial power as shall be necessary for the proper performance of their prescribed duties."

It is, I believe, well recognized that an absolute separation, along rigid lines, of the executive and judicial branches of government, is a practical impossibility. In the performance of executive or administrative duties, the methods of judicial procedure and certain characteristic judicial safeguards often become a prime necessity to proper action. When such methods are introduced by law, it frequently happens that these functionaries are said to act quasi-judicially. If the propriety of their acts or conclusions is to rest, as frequently it should, upon the observance of judicial standards,—such for instance, as that the evidence upon which their conclusion rests, if required to be taken under oath, must justify the conclusion,—and especially if it is subject to review, the standard itself is judicially determined upon such review, by considering that it must meet ordinarily accepted judicial requirements,—for example, that there must be some credible evidence to sustain the conclusion and justify the act. And to explain the applicability of such standards, the courts resort to the proposition that such functionary acts quasi-judicially. Hence it must accept judicial standards. It is not long before the word "quasi" is dropped in some carelessly written opinion, and then we have it judicially established, by words, at least, that the body, administrative in its origin, is a judicial body or proceeds judicially. And, if by a new Constitution, the whole judicial power is lodged in a court or courts, it will at least avoid the embarrassment incident to a reformation of concepts embraced in hasty or ill-considered judicial opinion, if we save to the legislature expressly, the right to empower such executive or administrative bodies or functionaries to proceed judicially in the performance of their duties.

THE PEOPLE OF THE STATE AS A PARTY LITIGANT

The provision in the proposed section 1 for suits by and against the People of the State is a laudable one. The People in their cor-

porate capacity should be willing to do justice, or at least to have justice ascertained in respect to their rights and duties. One of the oft-recurring political scandals arises in New York State out of the necessity of resorting to a separate tribunal to establish the validity of claims against the state. The idea that the sovereign cannot be sued without his own consent in his own courts grows out of a historical fact that we can well overlook as inconsistent with the spirit of our institutions, by giving the consent once for all in the Constitution, instead of letting the legislature fool with it continually by defining from time to time, as it suits temporary expediency or party views, the causes of action for which claims may be presented against the state and the tribunals before which they may be brought. It is a well-known fact of recent history, that this tribunal has been the football of politics, existing first as a "Court of Claims," but not judicially recognized as a court, and then as a "Board of Claims"[26] reconstituted in order to vote the incumbents out of office and institute their successors. It is also well recognized that this body with limited human powers is so congested that, it is said, its calendar of current business, without any additions, would take twenty years for its disposal.[27] This, of course, is a practical denial of justice amounting to sovereign dishonesty. Such is the proverbial injustice of sovereign states, that it called not long since for an able paper before the New York State Bar Association under the title "The Dishonesty of Sovereignties," with numerous illustrative examples to justify the title.[28]

Why should not the People of the State be as amenable to judicial control,—to the extent at least, of judicially determining their duty,—as the citizens of the state? One of the greatest hardships that can be imposed upon a citizen or property owner, is to find that the state has by devolution or otherwise acquired a junior lien or some doubtful claim, and that he cannot remove it or procure its satisfaction, either by disputing it or paying it off. Yet such is not an infrequent result of the doctrine that the sovereign cannot be sued in its own courts without its consent. Repeated attention has been

[26] See *Smith* v. *State of New York*, 214 N. Y. 140; and Remarks of Ex-judge Cullen, Report New York State Bar Association, 1915, Vol. XXXVIII, p. 721.

[27] Report New York State Bar Association, 1915, Vol. XXXVIII, p. 57; 1913, Vol. XXXVI, p. 391.

[28] Report New York State Bar Association, Vol. XXXIII, 1910, p. 229.

called both in the American Bar Association and the New York State Bar Association [29] to the intolerable hardship of this situation, illustrated by actual instances. A state should give its own consent to have its just rights and its just duties, as property owner or as wrongdoer, adjudicated according to established principles of justice as ascertained and administered in its courts. No fear need be entertained under the proposed constitution that improvident executions will be issued against the state. Section 9, which relates to certifications to the legislature, still implies the necessity of legislative action for the payment of money judgments against the People of the State.

THE ABOLITION OF EXISTING COURTS

Section 2 of the proposed Constitution requires no comment from me, save to call attention to the phrase "All of their jurisdiction should thereupon be vested in the Court of the State of New York." This might imply that the word "should" as contrasted with the word "shall" in the following clause, connotes a merely advisory meaning. It seems to me that "shall" is the proper word in each clause.

APPEALS

Section 3 providing for division of the court, contemplates a division of intermediate appeal and a division of final appeal. That is a perpetuation of the present practice adopted merely to relieve congestion in the Court of Final Appeal. I have already stated that, in my view, the ideal system contemplates one trial and one review within the reach of every litigant for the *correction* and not the mere *discovery* of error. If any other arrangement is made it should arise from practical necessity and not through the application of any theory of the rights of litigants. I doubt whether fixing the number of divisions, if any, of intermediate appeal should not be regarded as a part of the administrative business of the court to be determined by the Convention of the Judges or by the Board of Assignment and Control. I see no advantage in a *constitutional* division of intermediate appeal. There will always be a disposition on the part of litigants to consider that they have not had justice, if the Court of Final Appeal is closed to them. It appears to me that if the judges

[29] See Reports of Committee on Government Liens on Real Estate, American Bar Association Reports 1915, p. 531; 1914, p. 626.

of the Division of Final Appeal sat in divisions with the possibility of the reservation or review, according to rule of court, of matters of sufficient public importance to require the consideration of a majority of the entire division, it would result in a more harmonious administration of justice and a greater certainty of law than any system based primarily upon an initial appeal to an intermediate division of different personnel.

The jurisdiction of our Court of Appeals has been recently limited by legislation so as to exclude an appeal as matter of right, where the judgment of the intermediate appellate division, not involving an interpretation of state or federal constitution, is a unanimous judgment of affirmance.[10]

In the discussion of the advisability of this legislation, my attention was directed to a series of decisions of the Court of Appeals construing our transfer tax law, from which it appeared that, for several years, substantially every case of reversal of the appellate division upon this subject has been a reversal of a unanimous decision, while substantially every case of affirmance upon this subject has been the affirmance of a decision from which there was a dissent in the appellate division; so that my informant who had collected the statistics, facetiously stated that if a man wanted to secure a reversal by the Court of Appeals he must be careful to get a unanimous contrary decision below, for, if there was a dissent below, the chances were 100 per cent in favor of the majority being right, whereas if they were unanimous, the chance of their being wrong was 100 per cent.

What can be the possible advantage of closing the Court of Final Appeal to unanimous decisions of the intermediate court, in the face of such illustrations? Is it not more likely that the same cast of thought and adherence to the permanent judicial traditions, making for greater certainty of law, would arise from a final court sitting in divisions, with a right to sit in banc under rules, than a constitutionally enforced separation into two divisions, one superior, the other inferior, and of different personnel? Where there is but a single court, I can see no objection to abolishing the intermediate divisions of Appeal and having the final division sit in divisional parts, with reservations to the full bench of the final division, a majority to constitute a quorum. Both in Massachusetts and New Hampshire I have been a participant in causes where the question of law was

[10] New York Laws, 1917, c. 290.

reserved by the trial judge for the full bench, thus avoiding the necessity of a duplication of argument upon important questions of law, and suspending final judgment until the opinion of the final court had been pronounced. This economized labor of court and counsel and greatly facilitated the progress of the litigation. If the court were constitutionally free to follow this course, it could be provided by rule, and the court could adopt from time to time such course as should seem appropriate, without the rigid inflexibility contemplated by the proposed section. It has been found possible in many administrative bodies, such as the Interstate Commerce Commission and the Federal Trade Commission, to apportion the work so as to avoid the formation of distinct divisions and without impairing the efficiency of the entire body as a working whole. It seems to me that a similar apportionment might be made by the court to avoid intermediate appeals, as a wasteful expedient.

FLEXIBILITY A MEASURE OF CIVILIZATION

Flexibility of procedure really measures the distance of a people from barbarism, if not from savagery. All early idea of both law and procedure is rigid in its formalism. Rights themselves, supported by law, must fall within limited and simplified categories, and remedies must be pursued in specified formulae; that is a substantial progress out of juristic chaos, but it does not mark a high state of civilization, at least it marks a crude stage in judicial evolution. We have now progressed through equity toward the abolition of the formalism of legal concept, but equity itself has become formal, and again rights and remedies fall into established categories—"heads of equity jurisdiction." We have also advanced in some states beyond the common law forms of action, and assumpsit and debt and case, and trover and trespass have in certain jurisdictions disappeared as separate forms of action, but as a profession we still stick to the distinction between law and equity, and judicial minds will preserve the distinction, notwithstanding determined effort to abolish it in the administration of law. So we have persistent judicial effort, aided and directed by professional advocacy, which preserves in practice what has been abolished in theory; or which introduces the rigidity of law into the administration of equity, instead, as intended, of liberalizing legal procedure to accord with equitable concepts. It seems to me that this same disposition, in a

different aspect, is manifest in the constitutional effort to perpetuate an intermediate Court of Appeal, once established and in operation, instead of leaving that to be one of the flexible incidents of an evolution from necessity.

REVIEW OF INTERLOCUTORY ORDERS

Personally, I do not feel that I can too strongly urge that a large part of the necessity for an intermediate appeal would permanently disappear if it were recognized in state, as in federal practice, that an appeal from interlocutory orders, with certain narrow exceptions, is not a right and should not be accorded.

JUDICIAL DEPARTMENTS

Section 4 seems also to be open to the same sort of criticism as section 3. Why should the Constitution create judicial departments? Why should not that likewise be considered a part of the administrative business of the court, to be dictated by its experience of local convenience and necessity?

THE APPOINTING POWER

Section 5 seems to invite the inquiry why the governor should exercise any appointing power whatsoever; and whether it would not be more consistent with the fundamental justification for the election of a chief justice, that his selection should always rest with the electorate, that his duties in case of death or retirement be performed by a *locum tenens* designated from the other judges by the remaining members of the Board of Assignment and Control, and that the vacancy be filled at the next general election, occurring at least six weeks after the vacancy, or at a special election, if deemed proper, to be called for the purpose?

Why should not the chief justice, if elected to make an appointment, have the power of appointment, instead of the mere power of nomination for confirmation by the Board of Assignment and Control? In New Jersey the Chancellor's appointments of Vice Chancellors has proved a great success, and no body of men command greater respect than the appointees of the Chancellor.

JUDICIAL PENSIONS

The pensioning of a retired judge seems a desirable innovation; it is consonant with a practice largely prevailing. The present

Constitution[21] forbids them to serve as judges after their seventieth year and fixes their compensation, and yet it is evaded, by authority of statute, by the device of selecting them as official referees.[22] While it is true that they render valuable service as official referees, their designation for that purpose, primarily as a justified pension for acceptable judicial work, is contrary to the fundamental theory of their forcible retirement from the judicial office.

There is small necessity for further comment upon the later sections of the proposed article. The principle of the previous sections being accepted the later sections naturally follow, in the main, as a harmonious part of the scheme. The innovations are sufficiently explained and advocated in the report.

THE POWER OF REMOVAL

Section 7 leaves it doubtful, perhaps, whether in case of removal of a justice the board is concluded by the certificate of the Board of Assignment and Control and must act ministerially. It would seem well to definitely settle this point in the section itself.

MASTERS

The present system of distributing judicial patronage through the designation of referees to particular litigants is liable to serious abuses, continually manifested in practice, the chief of which are the designation of men incompetent for the service and the unjustifiable increase of the cost of litigation. The per diem fixed by law, $10 a day,[23] is notoriously inadequate; and the permission to agree upon a different fee has led in practice and experience to serious abuses, sometimes operating unjustly against the referee, at other times, and more frequently, to the disadvantage of a litigant. It is so liable to such abuses as to be one of the chief objections to the present method of administering justice. Every argument in favor of referees applies more forcefully to standing, salaried masters, and every substantial objection to referees is avoided by such office of master. The fee system is always liable to abuse. It has been abandoned in many cases, but it survives in some of its most objectionable features in a system of refereeships, distributed as

[21] New York Constitution, Art. VI, s. 12.
[22] New York Judiciary Law, ss. 115, 116.
[23] New York Code Civil Procedure, s. 3296.

judicial patronage, with an indeterminate charge paid by one of the disputants to the virtual judge. It creates, if it does not justify, the suspicion and the complaint, that the referee's pecuniary interest too often dictates his decision. He should be removed from the temptation, as well as from the suspicion.

If the argument in favor of an elective chief justice is to be given its full weight, it does not seem apparent why his designation of masters should be subject to confirmation by the board. If the appointing power is to be vested in him, it would seem that it ought to be untrammeled, save by the right of removal for unfitness.

As masters are to be designated by the judicial department, it seems inconsistent for section 8 to provide for the salaries to be fixed by local fiscal municipal boards in the several counties. It would seem that county boards should not have control unless their salaries are a county charge, and that these should not be a county charge unless the authority is a local authority and their district a county.

The economy and advantage of a properly administered system of masters is apparent. It is not only justified by the success of the plan in England, but it commends itself in practice through the satisfactory operation of the system of referees under the federal bankruptcy act.

JUDICIAL ADMINISTRATION

Section 9 is in the main self explanatory, and in the new system it is probably the most important section. Its provision in respect to *rules of evidence* is, in my opinion, a very praiseworthy one, though a great innovation. It is the chief fault of our judge-made law of evidence, that a judge-made rule, no matter how harsh or unsatisfactory it may prove in practice, remains the law of the land. Many of our judge-made rules are the subject of serious criticism; notably the rule peculiar to New York State, and characterized[34] by Wigmore as "the New York quibble," that a lay witness, testifying to the acts and conduct of a person in a controversy over his mental competency, is limited to expressing his opinion in respect to the impression made upon him by such acts and conduct, to the single view whether they seemed rational or irrational; whereas there is no real reason why such person should not be permitted to charac-

[34] Wigmore, *Manual of Evidence*, p. 325, s. 1434.

terize such impression, even to the extent that he thought the person was crazy or that he was competent or incompetent to do the act in question. A board of such control could modernize the rules of evidence by prescribing particular rules so as to mitigate the absurdities in our faulty precedents inconsistent with the trend elsewhere. Wigmore's *Manual*, as I have already said, contains countless illustrations of specific decisions which have fixed the law in a particular state at variance with the same law in general elsewhere, though both were supposed to be merely intelligent methods for ascertaining truth and not ends in themselves.

DISCIPLINE OF BENCH AND BAR

The Committee on Discipline advocated by section 10, is likewise a desirable innovation. A judge, as well as a member of the bar, should be subject to the discipline of his own institution. Impeachment is a most drastic method of punishment; it almost always is administered politically and for partisan reasons, either for offense or defense; it is never used to correct minor errors, consequently there are numerous small abuses arising from judicial administration which are not subject to correction. Judicial delay or neglect or petty abuse of privileges, or offensive conduct toward lawyers, litigants or witnesses, antiquated or wasteful methods, all go entirely uncorrected, merely because there is no avenue through which correction may be achieved. The judicial establishment should have machinery for rectifying its own abuses.

Also the Board of Discipline should administer the courts' power of supervision of the *bar*. This power in New York State is now systematically administered through the voluntary but very expensive activities of certain bar associations, which impoverish themselves in an effort to keep the bar at a high level of decency. It should be a state charge.

The laxity and indifference of courts in tolerating abuses by the bar, has been the subject of bitter and widespread criticism; it is one of the most thoroughly justified complaints against judicial administration. The officers of the National Credit Men's Association have within two years made it the subject of a special appeal to the American Bar Association and to the state and local bar associations.[35] The courts of New York have for several years past been

[35] See Report American Bar Association, 1916, Vol. XLI, p. 455.

alive to the necessity[36] and have administered appropriate discipline to an extent unequalled elsewhere. Nevertheless, the burden of investigation has been undertaken by bar associations at great expense; and if it were not for the voluntary activities of the association the work would remain undone. This method necessitates a double investigation of the same facts, once the voluntay investigation undertaken by the Committee on Grievances of the Association, and then the formal investigation before an official referee, leading to unnecessary delay, duplication of expense, and the exhaustion of the patience of witnesses and complainants.

JUSTICES OF THE PEACE

Section 12 providing for justices of the peace commits what seems to me to be a grave error in Constitution drafting, in that it measures the jurisdiction of judicial institutions by undefined existing conditions. A Constitution should define the limitations which it imposes and not leave it to casual and perhaps faulty examination to determine the conditions which it prescribes as a measure. Such conditions always become more indefinite as they recede in point of time, and some of the greatest pitfalls of constitutional limitation are to be found in such indefinite reference.

JUDICIAL STATISTICS

The article (Sec. 13) contains a wise provision for the collation and publication of judicial statistics. An adequate knowledge of judicial administrative requirements must be dependent upon systematic judicial statistics. The statistics of England, and of some scattered courts in this country, such as the Municipal Court of Chicago, the City Magistrates' Court of New York City and the County Court of Alleghany County, Pennsylvania, are not only publicly instructive, but they reflect and in a large measure make possible the efficiency of those courts. The people have a right to know and they ought to know the relative activity of their courts; judicial statistics keep them apprised of efficiency and need. Only one who has studied such statistics can grasp the surprising light which they throw upon the judicial establishment in its relation to civic life, the increase of litigation with growth of population, the relation of

[36] "Disbarment in New York" by Charles A. Boston, New York State Bar Association Reports, Vol. XXXVI, p. 467.

litigation to periods of prosperity and financial depression, the relation of particular civic conditions to classes of litigation, the relative efficiency of different courts and judges, the necessity for more judges in particular places or for particular matters. All of them are quickly reflected and indicated by properly compiled judicial statistics. All of these factors are graphically illustrated in the English judicial statistics periodically compiled and published by the King's Remembrancer, and in the City of New York similar work is done under the auspices of the appellate division in the first department without the requirement of law, upon a plan devised by a committee of judges with the aid of qualified expert accountants as well as the clerks of the courts. A systematic rather than a sporadic collection and publication of judicial statistics would prove of value to both people and courts.

UNCONTESTED PROBATE MATTERS

The proof of uncontested wills and the issue of uncontested letters testamentary and letters of administration or guardianship are often regarded as an administrative and not as a judicial function. It is not inherently a judicial function any more than the recording of deeds duly acknowledged or the filing of chattel mortgages. It creates a *prima facie* right; in practice, even though done through a court, it is a ministerial labor. I should recommend some specific provision in the Constitution to preserve such uncontested matters as administrative functions of a local office readily accessible. But I am advised that the proposed article will not interfere with the establishment of such offices either under the auspices of the Masters or the inferior judiciary.

Finally, I commend to the favorable consideration of the readers whom *The Annals* will reach, the proposed Judiciary Article, to the end that the reformation in the direction of simplicity, flexibility, efficiency and economy, which it recommends, may be attained.

THE LAYMAN'S DEMAND FOR IMPROVED JUDICIAL MACHINERY[1]

By William L. Ransom,

Former Justice of the City Court of the City of New York; Chief Counsel of the New York State Public Service Commission for the First District.

Some day before long, laymen will demand that lawyers and judges organize the courts and systems of legal procedure for the better administration of justice. Before that day comes, men in general will have learned a great deal more than they know now as to ways and means of making democratic instrumentalities yield results and as to brushing aside individuals or classes who seem to stand in the way of such a consummation. No matter how brief or how protracted is the participation of the United States in the war against Germany; no matter whether American energies and resources have been taxed to the uttermost before the dawn of peace sends the wonderfully organized military, industrial and civic forces of Europe back to take up again the threads of a transformed industrial life, the admonitions of the European experience and the reconstructive impulses of the present period of preparation in this country are certain to combine to bring marked changes in the integration, coördination, and general organisation of public affairs and commercial management in the United States. The sort of thing which has been done in many departments of governmental activity, under the pressure of wartime necessity and as a measure of organization for national self-preservation, will be carried on and extended by men who believe that if such things can be done for public benefit in time of war, similar things can be done for public benefit in time of peace. No one can read English newspapers and periodicals during the past year without a realization that in the reorganization of industry, the "speeding up" and "tuning up" of public administration, and the development of an altered attitude on the part of the general public towards essentially public concerns, the last two years of the war, have been more eventful, more fruitful,

[1] Portions of this article have appeared in the course of a series of articles recently contributed to *The Cornell Law Quarterly*.

and more far-reaching than any other two hundred years of Anglo-Saxon history. England and France will not soon return to slipshod, unsuited methods of mismanaging public or private concerns, and all the world will feel the consequences of what has taken place, irrespective of whether a particular nation is or is not impelled to similar action by similar necessities.

THE DEMAND FOR IMPROVED JUDICIAL MACHINERY

The ending of the need for better organization for war is bound to bring, in the United States and elsewhere, emphasis on the need for better organization for the tasks of peace. Old formulas and methods will be squarely challenged and unhesitatingly discarded, if found at variance with the recent experience. The ten years following the close of the world war are almost certain to be years of iconoclasm, of smashing of idols and breaking down of long established institutions; of predisposition to change and restless searching for methods which minister more directly and unmistakably to newly manifest needs. Institutions which are to survive will have to be put in order to meet the challenge and endure the test; members of the bar will, in particular, as is traditionally true in all periods of flux and readjustment, be confronted with an especial responsibility, twofold in its aspect: a responsibility for an open-minded readiness to work out needed changes in a timely, sound, constructive way, and a responsibility for leadership in resisting mere denunciation and demand for mere change for its own sake, whether for better or for worse.

We have been talking and writing about judicial reform in the United States for a good many years, and have been making considerable headway, more than is readily recognized even by the bar, and far more than is ever recognized by the ready lay critic of courts and legal institutions. At the same time I have not the slightest doubt that the severest test of, and onslaught upon, the American system of administering justice according to law is still ahead; and changes are coming within the next twenty years far more drastic and thorough-going than have thus far taken place, from the time our Constitution was set up and the English common law appropriated from across the seas. I do not think the assault will be made upon the spirit or substance of our laws, or upon the ultimate responsiveness of the courts and legal doctrine to the changed social

standards of the people; I think our Constitution and our common law, supplemented by statute, will continue susceptible of constructive and progressive adaptation, as Mr. Justice Moody said, "to the infinite variety of the changing conditions of our national life." The difficulty is coming as to the *mechanics* of our judicial system, the suitability of present-day legal procedure as a modern device for the accomplishment of a basic end, the administration of prompt, impartial justice under law. The economic and social readjustments following in the wake of the war are bound to give new force to the demand for more suitable organization and more direct administrative expedients in the judicial branch of government. Already the iconoclastic voice of the lay critic is being heard along lines well-founded only in part. For example, an excellent article in a recent issue of the widely circulated *Saturday Evening Post*, dealing with the readjustments which war-time conditions are likely to bring, concluded as follows:

> The thing which refuses to change—the one bulwark of our civilization which declines to conform itself to modern needs and modern conditions and modern transformations—is the method of administering and interpreting the civil and the criminal laws. The surgeon who dared practice his profession by the ethics and the standards of a hundred years ago, or even of fifty years ago, would be prosecuted, most likely, for malpractice; the business man who endeavored to carry on his business as his grandfather before him had carried it on would go briskly into bankruptcy; the editor who ran his newspaper the way they ran newspapers when Horace Greeley and George D. Prentice were alive wouldn't run it any longer than it took for the sheriff to catch up with him; but the lawyer hobbles along in his rusty shackles, clanking the leg-irons of ancient precedent, and violently opposing the introduction of labor-saving, time-conserving improvements into his trade, because such steps would distress Coke, and possibly give pain to Littleton, and mayhap cause Blackstone peevishly to toss about beneath his tombstone. Counsel for the other side still may browbeat the citizen on the witness stand as though the latter were a malefactor at the bar, doing it with the full approval of His Honor upon the bench, not because there is any fairness in it, but because such always has been the rule in courts of law. Because of a steadfast devotion, among the lawyers and the judges, to traditions and to texts and to precepts which in other callings would have been outgrown and cast aside years and years ago, litigation means vexation and justice stands blindfolded with procrastination on her one hand and delay on her other. A misplaced comma in the indictment invalidates the just conviction of the criminal and saves him from the punishment he merits. The mote is more important to be plucked away than the beam, and those august gentlemen in silken robes, sitting in the high places of the high temple, gag at the gnat and swallow the camel without visible strain. That bumpy, torpid appearance, so often observed, is the result of having swal-

lowed many camels. Verily, as has been said before, we live in times of change, and no man knows what the morrow may bring forth; but of this much we may be sure: That, disdaining all the filtration devices of progress, the law will continue to be true to the moss-covered precedent, the iron-bound precedent that hangs in the well.

THE LAYMAN'S CHALLENGE TO THE NEWER GENERATION OF LAWYERS

Much of this appears to the trained legal mind to be loose and undiscriminating lay comment, but therein lies most of the danger. The constructive tasks of the post-bellum period are not likely to be reposed in the hands of judges or lawyers; laymen commonly *think* something very closely approximating the statements above quoted; and unless jurists and lawyers deal with these procedural derelictions in *timely* and *adequate* fashion, laymen are likely to make short shrift of legal traditions and impatiently to brush away formulas which lawyers like to think are essential to the very life of the law.

This article is the product of an effort to outline certain impressions and certain queries which have come to me during a service of three years and a quarter in a very busy court. They all concern one central subject, the *mechanics* of administering justice according to law, the suitableness and efficacy of the *means* by which in the judicial sphere society seeks to secure the assumedly desired *result*. For the most part the paragraphs which follow are made up of impressions and queries, rather than conclusions or contentions. No merit of novelty, originality, or even finality of individual inference, is claimed for anything here written.

For years much of the ablest and most progressive and constructive thought in this country has been given to the perfecting of our executive and legislative machinery—municipal, county, state and national. The slogans of a dozen efforts along these lines are household words throughout this land. The "short ballot," "the commission form of government," the "city-manager" plan, civil service reform, the coupling of power with responsibility, the introduction of expert handling of matters requiring expert knowledge, "proportional representation," reduction in the size of local legislative bodies, enlarging the unit from which its members are elected —these are some of the phrases which summarize a quarter-century of constructive effort for the mechanical improvement of executive

and legislative departments. The significance of these suggestions is well taught in our colleges, but parenthetically may be interjected here the first query: *Have we given, are we giving, similar attention to the perfecting of the organization of our judicial establishment?*

Justice poorly administered may be justice wholly denied. If the organization and procedure of the judicial branch of government is not kept abreast of the needs and experience of the times, of little avail may be the good intentions or the ripe learning of individual judges or the sociological acceptability of the legal doctrine they expound. It may be added that the course of judicial decision in this country during the past five years confirms strongly an observation which I think may also be drawn from the whole history of Anglo-Saxon jurisprudence, *viz.*, that legal doctrine, as such, is far more flexible, adaptable, susceptible to wholesome influences which make for timely conformance to changed social standards, than is the machinery of jurisprudence, the organization and procedure of the courts. I have accordingly come to believe that a large part of the present-day dissatisfaction with justice as administered by the judicial branch of government is due to the consequences of poor organization and unsuitable procedure, rather than dissatisfaction with the law as such.

A RESTATEMENT OF PERTINENT FUNDAMENTALS

In order to get our bearings on the problem, it may be of value to re-survey certain fundamentals. The President of the United States, in his remarks before the American Bar Association in Washington in 1914, phrased a pointed summation of the criticism which, in one form or another, has oftentimes been directed against the administration of justice—the charge of great variance between the justice which is the product of a judicial proceeding and the justice which the sense of fair dealing innate in every human breast conceives by intuition to be applicable to the particular dispute. Thomas Hobbes in his great studies of the common law reached the conclusion that there could be no "justice" that was not identical with "law," and John Norton Pomeroy in his research into the origin of equity jurisprudence referred to the concept of "justice" known to the Roman jurists as the *arbitrium boni viri*, which he translated as "the decision upon the facts and circumstances of a case which

would be made by a man of intelligence and of high moral principle," and added that if this theory

> which now prevails to some extent should become universal, it would destroy all sense of certainty and security which the citizen has, and should have, in respect to the existence and maintenance of his juridical rights. . . . . Every decision would be a virtual arbitration, and all certainty in legal rules and security of legal rights would be lost.

LEGAL ADMINISTRATION AS A FACTOR IN GOVERNMENT

Mr. Frederic R. Coudert, esteemed on two continents as one of the most scholarly leaders of the American Bar, has recently said:

> There is in all modern states today a general conflict between certainty in the law and concrete justice in its application to particular cases: in other words, between the effort to have a general rule everywhere equally applicable to all cases at all times and the effort to reach what may be concrete right dealing between the parties at bar upon the particular facts in each case. On the one side is made an appeal to "Progress"; on the other to "Precedent". . . . . When rules (of law) become so fixed and rigid that they are difficult or impossible to change, the law is out of touch with prevailing notions of social expediency, which, like other opinions, are constantly changing; the law thus necessarily becomes a clog upon national development, an incentive to revolutionary reform. . . . . The conflict between the wisdom of past generations, as embodied in "Precedent" and the ideas of the present day concerning right and justice, usually denominated "Progress," has been for some time past more than usually acute.

What is the significance of the present-day acuteness of the "conflict" to which Mr. Coudert has referred? The history of civilization is the history of progress of the people in governing themselves according to law. It is the history of the decline of caprice and the substitution of self-restraint, individual and social; the history of the decline of favoritism, and the substitution of a rule of equality; the history of the decline of the authority of individual and impromptu standards, and the substitution of the authority of a fundamental social conscience and common standard. The end and object of government is, as Alexander Hamilton pointed out in the Federalist papers, the attainment and enforcement of justice; that is to say, the object of government is to bring it about that, in the determination of the rights and liabilities of individuals in their relations to each other and to the community as a whole, there shall be enforced a practical conformity, not to individual standards solely, but rather to the principles of fair dealing which have come

to be commonly held and generally accepted. Justice being the thing sought by the organization of government, men came readily to see that this conformance to the community standards of fair dealing could better be secured through the establishment and enforcement of definite rules of action prescribed by constituted authority—in other words through law—than through leaving the applicable ethical principles to be ascertained in each individual case as it arose, without reference to what had gone before. Thus it came about that law came to be regarded as the essence of justice, and the history of progress in government came to be virtually the history of progress in the administration of justice according to law.

The administration of justice is, as we have seen, not necessarily justice according to law; unrivalled and perfect justice may conceivably be administered by a ruler governed only by his own discretion or by a tribunal which enforces only its own standards and views. But the enlightened experience of human-kind has preferred an administration of justice according to defined standards and ascertainable rules, expressive of a generally accepted community-standard of what is right and fair—in other words, according to law. The administration of justice according to law is not necessarily an administration of justice by courts; executive and legislative officers of government often perform a large part of the administration of justice, and especially in times of popular dissatisfaction with the work of courts there is a strong tendency to entrust to administrative commissions the determination and enforcement of the community standards applicable to special classes of property or individual rights. Yet the enlightened experience of human-kind has advised that the judicial function be entrusted generally to separate tribunals, which construe and apply the rules, limitations and standards prescribed by the people as the sovereign authority, and also develop that series and system of broadening precedents which come to constitute the body of the law and provide a continuity of consistent determination of analogous cases.

PROMPTNESS AND CERTAINTY AS FACTORS IN "JUSTICE"

The reason why this legal conception of justice has gone hand in hand with human progress and has been indispensable to it is that, as economic and social conditions became more complex, certainty and uniformity in the arbitrament of individual rights became more and

more essential. Men had to know what they could depend on; they felt the need that commonly accepted standards should prevail in the determination of rights of property and personal obligation. The administration of justice according to a common and ascertainable standard became of greater social importance than the perhaps larger individual justice which might be secured from the determination of each case without reference to what had hitherto been done in any similar case. Social needs and social justice became paramount to individualized justice. It was found that rule and order in the administration of justice alone can enable men to act with reasonable assurance for the future; alone can insure an equal and impersonal adjudication of individual rights; alone furnish security from errors of individual judgment and impropriety of personal motives; alone guard against the sacrifice of ultimate interests, social and individual, to the transient but more clamorous demands of the particular exigency. This is why the administration of justice according to law became the essence of the modern state; this is why the court of justice according to law continues the distinctive institution of popular governments. "Respect for, and obedience to, the law," is, as Theodore Roosevelt has said, "the cornerstone of this republic and of all free governments," because the respect which the people have and manifest for the law and the courts is but an expression of what respect they have for themselves and for the fundamental standards and orderly conceptions of procedure which they have themselves set up for the fulfillment of their underlying social purposes. The people established the organic law as embodied in their constitutions; from time to time they amend or revise these constitutions; directly or through their representatives they enact the statute law, substantive and procedural; and they choose the judges who interpret the written law and develop the great body of judicial precedents which come to have the force of law. Dissatisfaction with, and criticism of, the courts and the administration of justice, therefore, become social phenomena of startling significance; when generally prevalent they indicate that in some manner the courts themselves, the body of the law which they administer, or the machinery of its administration, have become no longer fairly expressive of the fundamental social standards which they were created to apply. When a widespread popular demand arises for the breaking down of the established restraints and the accumulated precedents, and for

the restoration of a larger legislative and executive discretion pending the establishment of new judicial standards, there is need for a thoughtful reëxamination of the fundamentals of our institutions and a constructive survey of the present-day relationship between law and conscience; need likewise for a reëxamination of the elements of our judicial organization and legal procedure in the light of the progress which mankind has been making in methods of ascertaining the truth and expediting the conduct of business.

SHALL PROCEDURE KEEP PACE WITH DOCTRINE?

Today we are face to face with a period of frank, vigorous, thorough-going criticism of our judicial system. We are called to answer a square and reasoned challenge of the efficacy of our system of administering justice according to law. A great deal of current criticism, it is true, takes the form of violent appeals to prejudice and cupidity, and is phrased in terms of anger and unreason, and emanates from sources entitling it to neither respect nor consideration, except as recurring phenomena of unrest. I do not refer to or propose to discuss that kind of criticism; I do not in this article refer to or propose to discuss the criticisms voiced by sociologists and humanitarians who complain that their projects of human betterment are often thwarted by judicial decisions adhering to discredited theories of economics and government. I here refer only to that increasing volume of what may be regarded as conservative and constructive criticism, emanating from sources not usually given to adverse comment on our judicial system and based upon a real sympathy with the spirit of our laws and a sincere desire to make them effective instruments of justice. We are squarely asked whether juridical *mechanics* shall keep pace with legal *doctrines*; whether our machinery for administering the law shall be permitted to lag far behind the law it administers; whether justice as commonly conceived in the community shall be always delayed and oftentimes defeated by the community's own failure to provide suitable instrumentalities for its administration; whether we shall not soon begin to do for and with our judicial system and legal procedure that which we have been putting into effect as to our legislative and executive departments, in city, state and nation.

On the substantive side of the law we are today in the midst of a period of transition, readjustment and adaptation. The paragraph

which I have quoted from Mr. Coudert admirably epitomizes present day developments in that regard. This is a decade of humanitarian awakening on one hand and open-minded utilitarianism on the other. There is an effort to take into account new conditions, and an effort to make instrumentalities yield more efficient results. Old formulas are being found inadequate, under rapidly changing conditions. Problems take on new complexity; new conditions bring a new point of view, a new sense of public and private duty, and the suggestion of new remedies. Employers have a new sense of obligation towards their employes. Owners of great accumulations of capital have a quickened sense of trusteeship, the managers of large private enterprises have a changed view as to the permissible limits of commercial competition. This humanitarian spirit seeks to find expression in laws and in constitutional provisions. Yesterday's standards of what constitutes the measure of the employer's duty to the employe, for example, are definitely and almost universally discarded today. The community has moved on; the public conscience has broadened and quickened; adherence to yesterday's standards arouses only resentment and rebuke. The changed view comes, and then the people expect every instrumentality of government to accept and reflect that change. When the courts fail to do so, criticism results. The more emphatic the awakening of the people in any particular period, the more emphatic the popular resentment against legal precedents or legal machinery which lag behind.

ANALOGIES FROM LEGAL HISTORY

That is the history of progress in Anglo-Saxon law. What is taking place around us today is not new. The Romans, sagacious in avoiding difficulties, had a most convenient system for keeping their law abreast of the times. When judicial precedents made in private suits became greatly embarrassing in their limitations upon public policies, the praetor was empowered simply to abolish them. Thus the Roman law was kept flexible. But English law has, doubtless fortunately, known no such method. With us only an uprising of public sentiment accomplishes this emancipation of justice from the thralldom of ancient precedents, and infuses into the law the vigor of new ideals and concepts. In England in the sixteenth century, justice was tied hand and foot with rigid and cumbersome rules. Precedent was everything; technicality and

form were decisive; equity was unknown. A great sixteenth century judge held that, even after a bond had been paid in full, the holder thereof could sue upon it and recover the full amount, unless a formal receipt and release under seal had been executed and could be produced. When his attention was called to the unfairness and inequity of such a rule of law, such considerations meant nothing to him. He felt bound to follow only the precedents and to regard only the dry forms of the law. Rulings such as these produced an uprising of public opinion, led to the creation of Courts of Equity presided over by chancellors who were not lawyers but clergymen, and thus brought permanently into the law a great body of ethical conceptions which had their origin wholly outside the law. And so in the eighteenth century Lord Holt, one of the great English judges, held that a person to whom a promissory note had been endorsed and transferred could not sue upon it. The customs, needs and common practice of the business men of the United Kingdom meant nothing to him. It was enough for him that the strict precedents of the common law did not recognize commercial paper as negotiable. He said that tradesmen should conform their business to the way which was legal, rather than that the law should be conformed to the custom and conscience of the country. Of course, Lord Holt had "guessed wrong" and Lord Mansfield was right, and the law merchant became one of the most universally approved parts of our law. The judgment and needs of the people had triumphed over the strict rules and precedents of the law. The essential justice and fairness of the law merchant was infused *en masse* into the English law and was followed in this country, although even Thomas Jefferson, supposed high priest of progress, argued vigorously for a rule of legal construction which would "rid us of Mansfield's innovations."

A PERIOD OF TRANSITION IN THE LAW

Today we are in the midst of a similar period of transition in the law. Just as surely as in the sixteenth and the eighteenth centuries, our law is today being infused with a new body of social and humanitarian conceptions which reflect and express what is taking place in the world at large. A radical change in fundamentals of legal viewpoint is upon us and is taking place before our eyes. The sixteenth century judge who barred the doors to the doctrines of equity, and

the eighteenth century judge who barred the doors to the law merchant, have had their present-day parallel in the twentieth century judges who insisted upon enforcing their own economic and political concepts, rejected by the legislature and the people, and stubbornly refused to admit into our law the humanizing influence of twentieth century concepts of social justice; likewise in those who have failed to do their part in bringing legal procedure abreast of present-day standards for ascertaining facts and weighing their import. Yet the infusion of this new doctrine has been taking place, none the less, in this and every other state; we return only to the query whether similar advance is being made on the procedural side.

Take a single aspect of the change which has come in the application of legal rules to social conditions, that which deals with the liability of the employer for injuries to his employe in the course of employment. Originally, the employer had no liability and the employe no recovery. Then came the doctrine of negligence, that the employer was liable if the injury was occasioned by his failure to use proper care for the protection of his employe from injury. Even this doctrine marked a great advance over the remediless plight of the injured employe before; yet more recently the negligence doctrine came to be regarded as an inadequate expression of the humanitarian spirit of the age. The courts had introduced various refinements into the doctrine, to reduce the liability of the employer. He was held not liable if the injuries were occasioned by the negligent act of a fellow-servant or fellow-employe. Public conscience compelled the changing of this rule so as to hold the employer liable if the negligent fellow-employe of the injured worker had been entrusted with any duties of superintendence. Courts had held that the employer was not liable if the injury was occasioned by any conditions or dangers as to which the worker assumed the risk by entering the employment. This doctrine of "assumption of risk" was, by pressure of public conscience, either abolished altogether, as to some employments, or modified so as to make the risks assumed only those which necessarily remained after the employer had carried out his full duty of protecting the worker. The courts had held that the worker could recover for the employer's negligence only if he could first affirmatively prove that he (the worker) was free from contributory negligence, in other words, that no fault on his part contributed in the slightest degree to

the accident. Public conscience changed this rule, either by shifting the burden of proof of the employe's negligence to the employer, or by practically abolishing the rule altogether. From time immemorial it was the steadfast doctrine of the law that no liability could be imposed on an employer for an injury not the employer's fault. When an "experimental" statute was passed in New York, imposing liability without fault on the part of the employer, the Court of Appeals unanimously followed established precedents and held the statute unconstitutional, under both the state and the federal Constitutions. But the militant public sentiment of the state rose up and, in November, 1913, reversed and abrogated this ancient rule by a popular vote of about three to one, and substituted the rule that the employer might be held liable for all injuries sustained by employes in the course of their employment, even though the employers were not definitely at fault, and that the cost of compensating injured employes might be passed on to consumers of the product in whose manufacture the employes were injured. The popular adoption of this constitutional amendment was promptly followed by the legislative passage and executive approval of a workmen's compensation law far more sweeping, drastic, and "compulsory," than the tentative and "experimental" statute which had hitherto received the condemnation of the Court of Appeals. That court, when called upon to decide whether the later statute, now expressly sanctioned by the state Constitution, was to be deemed to violate the federal Constitution, squarely and admirably bowed to the course of events in state and nation, and sustained the validity of the new plan of compensation for industrial accidents.

ADMINISTRATION OF THE LAW TAKEN AWAY FROM COURTS

The foregoing are but some of the legal details, the legal battle-plan, of the contest which has been waged in this field between "Precedent" and "Progress," between fixed rules of law and the forward-looking spirit of the age. The incidents which I have cited as to the infusion of new and radically different social conceptions into our law governing the compensation of injured employes only illustrate the broader struggle and typify the essential principle which is slowly but surely being injected into our American jurisprudence, *viz.*, that a first charge upon the wealth produced in this country shall be the maintenance, in reasonable comfort and accord-

ing to reasonable living standards, of those who, by hand or brain, produce that wealth. The more interesting fact, from the point of view of the purpose of this article, is the effect which this agitation has had upon the procedure and mechanism of administering justice in this domain of legal right. The courts and their rules of evidence, procedure and the like, seemed to have flung themselves in the pathway of the results a changing public opinion was trying to bring about. For a heated year or two there was in consequence a period of sharp criticism of the courts, of discussion of "judicial obstruction of the will of the people," of ways and means of "overcoming the judicial obstacle to welfare legislation," and so on. Legal *doctrine* then gave way and the courts came fairly abreast of public opinion, but the brief period of "judicial obstruction" operated to remove the administration of the new legal concepts from the courts altogether. The administration of the workmen's compensation laws was taken from the courts and placed in the hands of newly created commissions, made up preponderantly of non-lawyers and specifically freed from the "technical rules of evidence" and other court-made rules which hitherto had been judicially invoked in bar of the humanitarian plan. Instead of bringing judicial procedure abreast of present-day business methods for ascertaining facts and determining controversies, public opinion took the performance of essentially judicial functions away from the courts altogether and attached their performance at least nominally to the executive branch of government. Instead of leaving the application of this branch of the law entrusted to the trained and impartial minds of members of a court emancipated from the cumbersome procedure and evidentiary rules it was desired to avoid, public opinion eschewed the court and the judicial atmosphere altogether, and turned this branch of the law over to men who were not lawyers and who, it was felt, would not be likely to clog and fetter the law again with outgrown rules and the trappings of a past age.

In 1913 the accident of a judicial nomination I had not sought and did not think I desired was followed by an election which transferred me from an administrative to a judicial office. In the administrative connection I had been performing functions quasi-judicial in their nature and operations—the ascertainment of facts, the weighing of the import of conflicting statements, the application of legal rules, the summoning of expert opinion to aid on technical aspects of

mooted problems, the sifting of truth from falsehood, the meritorious from the unfounded, the material from the inconsequential. In the performance of these duties I was a part of an admirably organized public department; few that I have seen in private business, and none in public affairs, surpassed it in the directness, efficiency, promptness and accuracy of its administrative processes. Although my duties entailed impartiality and open-mindedness, neither quality was deemed negatived by a prompt, direct, thorough ascertainment of the full facts, in the best way available. Although I constantly required technical aid, "opinion evidence" on expert matters, I was not called upon to listen to "hired experts" for any particular point of view or contention; the "experts" called into counsel were as disinterested and open-minded as I was. Simplicity and responsibility in administrative mechanism were constant objectives. It was seen that one responsible officer should be placed in position to deal adequately and continuously with all phases of a given matter from start to finish, and that to create "too many cogs" in the machine or to divide and subdivide the responsibility for decision, was to fly in the face of sound principles of staff organization to accomplish results. From the application of legal principles to concrete facts in such an atmosphere and under such an organization, I was suddenly switched to a bench and a gown, a stenographer and a corps of attendants; counsel and witnesses were placed at a distance; the atmosphere became one of a "game," a contest of wits, over which I was "umpire" but in which I was no longer regarded as an instrumentality with affirmative responsibility for seeing to it that the trial was simply, quickly and accurately elicited and justice done according to law. Experts, I found, had been transformed into hired advocates; oratory and pettifogging were substituted for quiet, direct discussion; controversies were postponed until they were a year or two old, instead of a day of two old; perjury seemed to creep in with the administration of the oath; every one was assumed and desired to be densely ignorant until enlightened by the developments of the particular case; and the crime of crimes became the assumption or assertion of a particle of information or intelligence not potentially inculcated by the testimony droned into the ears of the stenographer.

COURTS HAVE NOT KEPT PACE WITH MODERN METHODS

This abrupt transition suggested to me from day to day certain queries, some of which I shall endeavor to indicate. I soon found, too, that something had happened to the business man's desire to have his controversies determined according to the certain standards of legal rules, if that meant coming to court. Business men of the very type who readily and habitually submit their transactions to the scrutiny and guidance of a legal mind, out of court, were willing to do almost anything, in the way of abdication of all or part of their rights, rather than submit to a determination of a controversy by a court. Men of a conservative, law-respecting type, who never had given me the slightest impression of disrespect for or dissatisfaction with *law*, in general or as chart and compass for business transactions, were, I soon found, ready to "settle for fifty per cent" of the amount in dispute, rather than be subjected to "a lawsuit," even in a court which has been considered peculiarly the "business man's court" in the metropolis.

This led likewise to analysis and observation as to the precise grounds of the business man's dislike for the judicial tribunal. In the past fifty years we have revolutionized our methods of the conduct of private business, and largely also the conduct of public business; our methods are more direct, exact, and to the point; they minimize the possibility of error, eliminate "lost motion" and cut "red tape." Yet to all this improvement in methods our judicial procedure has paid substantially no heed. The mechanics of a court room trial are still substantially the same as they were in the days when our ancestors rode in stage coaches, used tallow dips or pine knots for lighting, and had never dreamed of "efficiency engineers" and the marvelous business development of today. I do not suppose that an alert business man or "business lawyer" ever comes from his well-organized, perfectly coördinated office into a present-day court without feeling, consciously or unconsciously, that somehow the court has failed to keep pace with the life of the community which surges outside its walls, and that somehow the organization, procedure and administrative routine of that court hark back to an era which the business community outside has necessarily superseded, in order to hold its own in the commercial competition of today. Judging the court by present-day efficiency standards and

looking upon it as a mechanism for bringing about a result, the average court is the most indirect, inexact, inefficient, uneconomical and unintegrated instrumentality in the modern state, and the wonder is, not that justice is at times so inexactly and tardily administered, but that substantial justice between man and man is so often the outcome of proceedings in such a tribunal. The improvement of the administration of justice, the reform of our legal procedure, the adaptation of twentieth century methods to the administrative organization of the courts, are tasks of the first importance, to which should be devoted the finest constructive ability that is sent forth from our colleges of law.

Is it surprising that a business man who has no quarrel with "law" nevertheless seeks to avoid the courts? The tribunal to which, as a last resort, the business man submits his controversies with his fellows is practically the only institution of private or public activity which, in its administrative and procedural methods, still lumbers on in the same old way of fifty or one hundred years ago. Right here, also, I am inclined to believe, will be found the responsibility for much of the acuteness and unacceptability of the variance between justice as administered in a court and justice as innately conceived by the average man of intelligence and good conscience. I do not find men unwilling to have their disputes and controversies determined according to the principles of our substantive law. It is not a desire to avoid the application of rules of law which drives business men out of the courts, into reluctant settlement of controversies which should be litigated on their merits or into the submission of them to arbitration tribunals established by private agencies. Litigants do not submit themselves before the arbitration committees of commercial organizations in order to secure the *arbitrium boni viri* or to subject their property and rights to individual judgment as substituted for long-established rules of the substantive law.

POPULAR AVERSION FOR LEGAL MACHINERY

The aversion of the average man is rather to the procedural and administrative side of our legal machinery. He believes in and needs the administration of justice according to law; the safety of his transactions requires certainty and rule as the basis of individual and property rights. Uncertainty and inequality were long ago called

"the twin bugaboos of Anglo-Saxon jurisprudence." Popular dissatisfaction with the law, as I have come to believe, is based not so much upon any variance between justice according to the substantive law and justice according to the *arbitrium boni viri*, as upon the great variance between the justice which would result from a fair, prompt determination of controversies according to substantive legal principles and the "justice" which does result from the existing procedural mechanism of our courts. Business men go to arbitration to avoid legal *procedure* and not legal *principles*. To "tune up" and "speed up" our judicial mechanism, to "cut out" the delay and "lost motion," to organize our courts and their workings along lines which take cognizance of twentieth century experience and expedients, and to bring to the aid of the courts those direct and simple administrative aids which modern progress has made available in every field of activity, are some of the paramount tasks of the present day, in which every young man coming to the bar should plan to do his part.

HAPHAZARD TECHNICALITIES WHICH MAKE JUDICIAL ADMINISTRATION ABSURD

Instances of haphazard and uncoördinated provisions, of the kind which have the effect just indicated, may be cited from the code sections governing almost any court. They naturally arouse the contempt of a business man when he finds himself trying to steer a course through and by them; they drive him from the court house with the impression that he and other business men are sure to lose, no matter who wins the juridical verdict, if they have anything to do with "a game played under such rules"; they represent a kind of "trappings" and "red tape" which business men have long since rejected, in the conduct of other aspects of human relationship. A single instance may suffice at this point. For reasons which are indicated in some detail elsewhere in this article, the City Court of New York, of which I was a member until my recent resignation, is the natural forum for the business men of the metropolis. It is, in many respects, as it has been called, "the great commercial court of the metropolis," because its jurisdiction embraces a large part of the controversies which arise between the great rank and file of small business men, and its calendar practice has been adjusted in certain respects to develop the court as an acceptable commercial

forum. Because it is no worse off than alternative forums, even in the respect I am about to indicate, the City Court continues to be the tribunal for the trial of a large part of these controversies, yet what of the procedural maze which envelops the unhappy litigant as he contemplates this "business man's court?"

A plaintiff may *sue* in the City Court for any amount of recovery in any action—for example, for thirty thousand dollars, instead of two thousand; the jury may *render* in his favor a verdict in any sum in any action; but in certain kinds of actions—in fact, in most actions, the clerk may not *enter* the verdict in a sum exceeding $2,000. If the jury finds for more than $2,000, there are certain kinds of actions in which he may enter a verdict for the full amount as rendered; for example, there have been judgments for $20,000 or $30,000. But in other kinds of actions, he may not enter the verdict in a sum exceeding $2,000, no matter what the verdict in fact was. At the same time he may enter the verdict for $2,000 plus interest, in certain instances where interest is an allowable factor, even though the addition of interest brings the verdict's total to a sum greatly exceeding $2,000, as is often the case.

On the other hand, if a plaintiff sues in the City Court for any amount, say $500, the defendant may interpose a counterclaim without limit, and, although a counterclaim is merely the cross-assertion of a separate right of action which he might have asserted in a separate action, he may recover, and the clerk may enter, a verdict in any sum on the counterclaim. If the plaintiff is entitled to sue for more than $2,000, the City Court cannot award him more than that sum; the defendant's counterclaim is bound by no such limitation. If the jury's verdict in the action in favor of the defendant on the counterclaim proves to be for $50,000, or any greater or lesser sum, the clerk is authorized to enter the verdict in the sum fixed by the jury, even though the plaintiff only sued for $500, or even though the plaintiff would have been fairly entitled to receive more than $2,000, but could not, had the disputed questions of fact been determined by the jury the other way.

If a bond is given in one of the classes of actions in which a plaintiff's verdict may not be entered in a sum exceeding $2,000 and interest, and an action is brought in the City Court upon that bond, there is no jurisdictional limit on the amount for which judgment

may be entered in the action on the bond, even though there was in the action in which the bond was given.

If a business man as plaintiff sues in the City Court to recover a chattel, more than $2,000 may not be fixed as the value of the chattel, but if the same man sues for damages for the detention of the same chattel, he may recover $20,000 or $2,000,000. There is no limit on his recovery.

WHY BUSINESS MEN ESCHEW LITIGATION

Instances like these rouse and rally the enthusiasm of the business man for resort to "the business man's court!" If the master of a ship assaults one of its seamen while the ship is tied at the wharf in the port of New York, the City Court of New York may not award the injured mariner more than $2,000. If the assault and battery took place while the ship was three miles out at sea, the same court may award the same plaintiff any sum warranted by the evidence, without limit.

If a young woman quarrels with her sweetheart and wants to recover back the money she had lent him while she thought they were to be "partners" for life, the City Court can give her only $2,000 of whatever may have been the actual amount loaned, yet if the same girl sues the same man in the same court for his breach of his promise to marry her, she may receive a verdict in any amount, without limit, and verdicts greatly in excess of $2,000 are by no means uncommon.

If a business man wishes to sue the City of New York, he will be surprised and puzzled to find that he cannot sue the City in the City Court! He must sue the City in the Supreme or Municipal Court.

If he wishes to sue a defendant in the City Court, he may not serve the defendant with the summons anywhere in the city, but only in certain parts of the city. If he wishes to be able to serve his adversary anywhere in the city, he must forego suing him in the City Court and sue instead in the Supreme or Municipal Court.

The City Court has no jurisdiction to hear and determine a cause of action in equity, but it may hear and determine equitable defenses in order to defeat a cause of action of which it has jurisdiction at law.

If the business man sues in the Supreme Court and his case is on the calendar eight terms of court, he may, when he prevails in the action, tax as costs an allowance for five terms; if he sues in the City

Court, he may tax but one term, even though the case was on the calendar eight or ten terms.

CONFUSING CHOICE OF FORMS AND FORUMS

Imagine the impressions which an average business man forms of legal procedure and technicalities as he comes in contact with some of these hit-and-miss distinctions. Try to conjure up the impressions which he carries away with him after a period of jury service. Picture the difficulties of a lawyer endeavoring to explain the "whys and wherefores" of such artificialities to a busy client unlearned in the law. The City Court may grant the business man as litigant a warrant of attachment against the property of a foreign corporation, but not a domestic corporation; it may upon his application aid him to collect an adjudicated debt from a foreign corporation by appointing a receiver of its property and assets, but if the "deadbeat" debtor be one of New York state's own creations, incorporated under the laws of the state which create the court, the latter can aid him in no such way.

If the business man wants his attorney to obtain an attachment in New York county, he finds a confusing choice of forms and forums. Four different and separate modes and details of application are prescribed in separated sections of the code—one each for the Supreme Court, the City Court, the County Courts and the Municipal Courts. A form of application sufficient in one court is fatally defective in another, although each application seeks exactly the same remedy. If the business man's lawyer makes the right form of application to the wrong court, his bewildered client is at least delayed, and is often defeated, in his interlocutory right, on which jurisdiction or the collectibility of his judgment may wholly depend.

IN THE NAME OF "REFORM" AND "SIMPLIFICATION"

And so it goes. Instances might be extended and multiplied. Many of these anomalies were graphically summarized by my former colleague, now Supreme Court Justice Donnelly, in an address before the New York County Lawyers' Association in January, 1912. These instances do not concern some slow-going court in a backwoods community, but "the business man's court" in the greatest city in the world. Similar things exist and persist in practically

every court I know; I have cited these because they have come nearest my heart and daily work for three and a quarter years last past. Only the legislature has power to change them; only constitutional amendment could take away from the legislature the power to change them, or to restore them, were they changed. They exist and persist; business men are bewildered and driven to distrust courts and avoid litigation; newcomers to our shores are given the impression that courts and laws, the very cornerstone of our American concept of equal rights under uniform and salutary rules, cannot be made to operate for their protection, but are something to be avoided at all hazards. And within the past few months a thoughtful and representative committee of the New York legislature, headed by an able lawyer, very solemnly proposed to "revise and simplify" procedure in the City Court by bringing all these anomalies and anachronisms together into one "City Court Act," carefully preserving each and every one that I have cited and multitudes more! This drastic and thorough-going reform has happily been postponed for the time, and the lawyer who wishes to find the code authority for these absurdities will have to go on searching through many pages and countless sections; but, unless revelation be deemed the beginning of betterment, the careful collection, codification, preservation and perpetuation of such "trappings" and handicaps on a "business man's court" can hardly be deemed even a start in the direction of law reform.

A CONCRETE INSTANCE OF RELIEF FROM DELAY AND CONGESTION

What I have been saying on the subject of the betterments which might, in many instances, be worked out by and through the judges themselves, without change in the constitution or code, has not been from a viewpoint wholly academic and theoretical. I have had a part in working out some instances of this sort of thing, in an atmosphere which will not be recognized as traditionally favorable, and have had an opportunity to see, concretely and from day to day, some of the actual workings of innovations which were inaugurated with some judicial misgivings. For example, as I have indicated, the City Court is in many respects the natural forum for the great volume of litigation which arises in the course of the metropolitan business transactions of the smaller dealers, merchants and jobbers, with their wholesalers on the one hand and their customers on the

other. The City Court is naturally a great commercial court, to which are conveniently brought the minor business controversies of business men in this great metropolitan center. Mixed in with this grist of commercial actions has been a great volume of tort actions of various kinds. For many years, it has been the custom to place all cases, whether contract or tort, commercial or otherwise, on the same calendar, and to afford them opportunity for trial when reached in the regular course, subject only to an anomalous and utterly unsound theory of preference, *viz.*, that if it appeared probable that a non-tort case could be tried within two hours, such a case could, on motion addressed largely to the discretion of the justices sitting in special term, be placed on a special calendar, known as the "short-cause" calendar and afforded a trial thereon within a few weeks or months. The natural result of this miscellaneous grouping was congestion. Defenses of the most labored and plainly perjured character were interposed, in the form of verified pleadings, on the most flimsy pretexts; just enough was denied to create an issue avoiding the possibility of judgment on the pleadings. Thus a default was avoided and the case was placed on the calendar, which meant a protracted period of delay. By the time the case was actually reached for trial, the elasticity of the memories of witnesses had often been refreshed most liberally from the necessities imposed by the applicable rules of law, and a defense, originally interposed only for the purpose of creating an issue which would enable the long delay of trial, became a defense supported by more or less plausible testimony sufficient to carry the case to the jury. The result of the calendar system was thus long delay, and the result of long delay was to put a premium on perjury and make the way easier to a perversion of the facts by the testimony as ultimately given. The calendar of the City Court had in consequence gained a tradition of being a long time in arrears, and at the close of the administration of Governor Hughes, we find a trenchant paragraph of complaint in his annual message, based on the fact that the City Court calendar was then upwards of three years behind.

The situation in 1913 and 1914 was not as bad as it had been, but the tort-contract general calendar was still more than a year behind, and the possibility of delay in the trial and disposition of commercial cases was still so great as virtually to compel small business men to settle rather than litigate. In this way there was

substantially a denial to them of that justice under law which should be the portion of all men in a democracy. I accordingly urged upon my associates the advisability of creating a separate "commercial calendar," on which might be separately and speedily tried all commercial cases, that is to say, the business men's controversies, in which money has been definitely laid out or goods delivered, as to which the party suing cannot afford to remain long unrecompensed, if entitled to recover at all; for example, actions for money loaned, actions on bonds and instruments of guaranty, actions on written contracts for the payment of sums of money only, actions for work, labor and services, actions arising under the provisions of the Personal Property Law (Uniform Sales Act) in relation to the sale and delivery of goods, and the like. It was pointed out that, not only would justice be more substantially accomplished by a speedy trial of this class of cases, but that prompt trial would almost certainly enable all litigation of this kind to be disposed of in less time than required for its disposition under the system which mixed these cases on a congested calendar greatly in arrears. It was urged that in this way all commercial actions of the sort indicated could be "preferred" and given practically immediate trial on a special "commercial calendar," to which two trial parts of the court could be assigned, and that before very long it would be found that this preferment of the commercial causes would operate to reduce the arrearage of the general calendar as well, through reducing the quantity of time required for the trial or other disposition of the commercial causes so preferred.

THE WORKING OF THE "COMMERCIAL CALENDAR"

The justices of the City Court accordingly created, by their own rule, the now well-known "commercial calendar" of that court, and provided that upon the application of either side, a cause coming within one of the indicated categories could be transferred from the general calendar to that calendar for trial. The plan has worked well for more than two years, has overcome all misgivings and exceeded all expectations in its practical workings. It has brought into the court new and desirable litigation, and with it also lawyers of a grade who had generally shunned the long delays of the general hodge-podge calendar. Notwithstanding the influx of additional commercial business, the proportion of the total trial-term time of

sittings required for the disposition of the commercial business has been reduced, so that more time has apparently been available for the dispatch of the tort cases and other litigation. Instead of thrusting the tort calendar into further arrearage, the plan seems to have had an influence in accelerating the dispatch of business throughout the court, and during two years and a half of practically immediate trial of commercial cases, the arrearage on the general calendar has been steadily reduced. At the time of the writing of this article, the general calendar was only a few months behind, with a prospect that the month of June, or next October or November at the latest, will find the general calendar within a month of being up to date, which is about as complete an approximation of "speedy justice" as is practicable or desirable in the case of a tort calendar, made up of cases in which the plaintiff should at least be given time to get out of the hospital before the case comes on for trial.

During these two years and a half, therefore, it has been possible for a business man, if he had a cause of action within the limits of the jurisdiction of the City Court, to start his action and have a trial, if he so desires and so directs his counsel, well within the month from the time his cause of complaint arises. I have tried cases on this commercial calendar in which suit was started, tried, judgment obtained, execution issued, and the judgment paid and satisfied, within a month from the day on which the cause of action arose. Twice during my last month on the bench I found myself trying cases which had been ten days at issue. The result has been that lawyers and litigants have realized that through the agency of this special calendar a practically immediate trial could be had of a commercial controversy. Some of the consequences of this have been most interesting to watch; they afford an explanation why it has been true that an increased volume of commercial business could be disposed of—note I have not said "tried"—in less time than was required for the dispatch of this business when reached on a congested and long-delayed general calendar. In the first place, fewer fictitious, sham and perjured defenses are interposed; defendants will perjure themselves to create an issue which would gain a delay of a year or two, but will not take the risk to gain a delay of a few days. Thus a smaller portion of the actions started are ever actually tried. It may be said also that many actions are not started at all now which found a place on the general calendar heretofore, because there is less

incentive for a "strike" suit, if it is likely to be disposed of within a few days, when all the facts and documents are at hand and within the recollection of everybody.

PROMPT TRIAL DECREASES PERJURY

Furthermore, the prompt trial of these cases has had a most interesting effect upon the psychology and atmosphere of the trials themselves. After a year's delay, or two years', the parties and witnesses seem far more likely to give versions of the events which may euphemistically be said to "fit the law" and so to present questions of fact on which the determination of a jury is required. Beyond a doubt, in many instances, what takes place is that the witness forgets in the long interval the precise details as to which he had a measure of knowledge at the time the controversy arose. By the time the case comes on for trial the details have for the most part passed from memory and his recollection is refreshed from the lawyer's notes or oral restatements to him of the line of testimony which is expected from him. A great deal of unwitting perjury, of radical shading and reinterpretation of details, is thus accomplished, where there is long delay in trial. But given a trial within a month or two after the trouble arose, and the atmosphere of the trial is far different. The witnesses give a much more straightforward, credible, dependable version of what took place; they are testifying from their own fair recollection; there is less disposition, less incentive and less favorable setting, for conscious or unconscious reshaping of details of the testimony. In consequence, the cases much less frequently become questions of fact for the jury; far more often they present only questions of law for the court, and their prompt disposition is facilitated. One who has not watched the thing from day to day from the "inside," can have no accurate conception of the difference in the atmosphere of a trial, conducted on a calendar which is continuously up-to-date, as compared with that of a trial on a general calendar which ever lags a year or two behind. Prompt trial is the greatest preventive of perjury which the mind of man has ever devised.

I promised the chairman of the Committee of Nine, whose report is the keynote of this issue of *The Annals*, that in this article I would indicate concretely some of the impressions, queries and suggestions which have come to me during my brief period of

service in a busy court, as well as during rather strenuous professional activity prior to election to the bench. Elimination of the law's delay is of course only one phase of the problem, one segment of the circle. Justice poorly and inefficiently administered is but little more acceptable because of promptness in the rendition of its results. The whole problem will have to be dealt with sooner or later, probably gradually, in a much more thorough-going and constructive way; I cannot undertake to outline, in a single article, hurriedly prepared, anything approximating a comprehensive statement of desirable details of change; I undertake only to present for consideration certain impressions which have come to me and are put on paper for what they may be worth, in the stimulation of thought or otherwise.

Contrast legal procedure and judicial organization as it is with what it might become, through taking into account the administrative expedients and practices which have become familiar in business and commercial life. A business man has a cause of action against another business man. Neither he nor the other man had any quarrel with the legal rules which give rise to the action; they had their business dealings on the basis of familiar and settled rules of law; they disagree somewhat as to the facts of the case; what they want is a speedy determination of the *facts*, and then a prompt determination of their rights under the facts as found and the applicable rules of law, as commonly observed in the community for the conduct of similar business dealings. So the man with the cause of action consults his lawyer, and from that point difficulty begins and the business man's instincts for common sense, direct action tending to reach the merits of the case run afoul of legal procedure.

THE FORUM, THE PLEADINGS AND THEIR SERVICE

First come the *pleadings*. Around the legal concept of a "complaint" and "answer" has been created a great, swaddling mass of technicalities. Instead of simply, concisely apprising the adversary as to the amount, nature and basis of the claim, we have developed a tradition of doing what is strangely called "stating facts sufficient to constitute a cause of action," and the first rule of all is that the pleader must not "state evidence," must not "aver conclusions," but must build a "projectile-proof" edifice of words which will stand the test of "demurrer" and "motion" based on all

sorts of grounds and controlled by prodigious quantities of precedents, all of which give to the document qualities of circumlocution, indirection, technicality and the like, which continue to curse and plague the whole course of the case. I do not think it can be said that our present system of pleading commonly serves any end of justice; it is not a method of narrowing issues, eliciting truth, defining rights, or securing direct approach to the matters really in controversy. Anyone with a contrary impression would lose it soon, if he had often to listen to the efforts of counsel to cross-examine plaintiff or defendant as to the contents of pleadings verified by the party under interrogation.

The second problem comes as to *jurisdiction* and choice of the *court* in which action is to be started. Here again the business man confronts another maze, with the peril of defeat as the penalty for wrong inference from the mass of code provisions and judicial decisions. Instead of one court, we have many; instead of equivalent powers and jurisdictions in each of the courts even within the financial limits of its jurisdiction, we have in many instances an unfathomable hodge-podge, one aspect of which I have already elaborated upon in connection with my own court. Could a nation ever fight and win a war with a military organization limited and hampered as is judicial organization? Could a business establishment ever succeed?

The next anachronism is disclosed in the matter of *service* of the summons and complaint. The methods of "legal service" are so indirect, clumsy and out-of-date as to make a down-town business man laugh in the face of a judicial officer who has to work with such antiquated tools. It is as though men were compelled by law to ride in oxcarts and light their homes with tallow dips. The code provisions as to service of papers ignore everything that has happened in the world since the post office became a governmental institution. The registered mail, the telegraph and the telephone are modern devices which the law is unique and solitary in failing to recognize as means whereby one person may bring about the presence of another at a desired place at an indicated time.

THE HANDLING OF INTERLOCUTORY APPLICATIONS

From the time the case is at issue it runs a course which mocks all the rules and expedients of directness and efficiency in handling

affairs which have been developed by modern business experience. Everything is done at arm's length; *interlocutory applications* of a purely administrative character, designed to narrow the issues, bring out the facts on undisputed issues, and prepare the controversy for trial under circumstances somewhat approximating adjudication on the actual merits, are treated as a part of a game of wits, are subjected to the authority of long-time precedents, instead of being judged on the merits of the situation disclosed in the particular case. Probably as many different judges express casual opinions regarding aspects of the case as there are applications made; the judge who has determined any of these preliminary things is rarely the judge who finally tries the case. The granting or withholding of these interlocutory expedients, such as discovery of books and papers, examination before trial, bills of particulars, amplification or clarification of the complaint, or the like, is permitted in this country to be the subject of appeals, and Appellate Courts undertake to redetermine each such matter as of first impression under the great mass of previous decisions, instead of looking upon it as a matter on which the judge at special term was warranted in using a reasonable discretion as to the method to be followed to prepare the case for a prompt, expeditious trial on the merits of its actual issues. The result of this casual attention on the part of many judges, in the trial court and on appeal, is long delay and a very unsatisfactory and fragmentary determination of phases of it by judicial officers who have casually dealt with the interlocutory applications.

A TRIAL BUILT FOR APPEAL AND RE-TRIAL RATHER THAN DETERMINATION

The *trial itself* lumbers on in practically the same fashion as was the vogue fifty or a hundred years ago. Methods and procedure throughout the business, political and industrial world have changed radically; the court lumbers on in practically the same old way, and committees on law reform rarely essay the task of giving sanction to more direct, exact and business-like expedients. The stenographer is about the only device at all modern which the court room trial has utilized to any degree, and even the stenographer is in nowise used to promote exactness of determination by court and jury upon the particular trial; the stenographer's services are to prepare the way for an appeal, and perhaps to guard the better

against changes of testimony on a second trial. The stenographer rarely does anything to aid the jury or the presiding judge to deal in exact and business-like fashion with the case on the first trial; no business office would think of utilizing the stenographer so little and so indirectly in connection with the performance of the task at hand. As in many other respects, the mechanics of the court room trial point to and prepare the way for an appeal, rather than promote an initial determination which would obviate appeal. I sometimes wonder if the time will not come when the stenographer's minutes or some improved "dictaphone" record of the testimony will be available for the aid of the jury.

I think I have sufficiently indicated a few of the aspects of legal procedure which give an impression of indirectness, inexactness and unsuitableness for the accomplishment of the object supposed to be in mind. There are many phases which I have not touched upon in this connection—for example, the modes of bringing witnesses to court, the anomalies in the law of evidence, the whole structure and theory of appellate review, the procedure after a higher court reaches the conclusion that error was committed on the trial below; but it seems preferable to devote the remaining paragraphs of this article to the constructive and affirmative side, the things which are worth thinking over as possible betterments in the practical workings of the legal mechanism. It should be kept in mind that, of course, any particular system or routine of legal procedure or juridical organization does not exist for its own sake and is not an end or objective in itself. The impartial, impersonal, expert arbitrament of private controversies under rules of law which nullify individual caprice and take no account of political influence, social position, or financial accumulations, is one of the great purposes for which Anglo-Saxon governments exist; but the mechanism, the procedure, are only means to an end, and should be scrutinized and dealt with as such.

THE REAL RIGHTS OF LITIGANTS AND THE PUBLIC

In the second place, it is often necessary to bring back to mind a realization that a law-suit is not a game of wits between opposing counsel; that no litigant has any right, vested or otherwise, in a mode of procedure which gives him a "sporting chance" to win on anything except disclosure and establishment of the actual

merits of his case; that he has no right at all to delay; and that the community itself has great reasons for interest in the maintenance of a system of administering justice under which a determination on the merits will be speedily, economically, efficiently reached, and under which no member of the community need feel that he has won or lost under "rules" and concepts which the community as a whole has with propriety long ago discarded. One of the great obstacles to reform in legal procedure has been the conscious or unconscious feeling of many lawyers that they have been schooled and trained to play a game, and their instinctive aversion to change in the rules, especially such a change as would mean that a prospective litigant with "no case at all" would soon find himself without need for the services of a lawyer. Many lawyers, and some litigants, feel that they have a right to have perpetuated a judicial mechanism under which a litigant with an astute lawyer can have "a run for his money" and possibly win a verdict, even though on the actual facts and established rules of law, he should have had judgment taken against him on the day after his adversary interposed his pleading. Three-fourths of the difficulty would be on the way to solution, if we could get out of the minds of lawyers and laymen the notion that the law is a game whose motto is "win if you can," rather than a branch and phase of government charged with a very important responsibility for reaching exactly and acceptably a result which is the very basis of free institutions. The lawyer schooled in a notion that his client should have a "right" to "a chance to win" where the law and the facts disclose no such possible right, is the worst foe of procedural reform through outside action and the most stubborn opponent of the efforts of judges to deal more directly with the situation themselves. In so far as we come to have lawyers with a more sincere and serious concept of what they are supposed to be doing and why there are lawyers at all, the mechanics of jurisprudence will be a less difficult problem, and changes in rules will be less essential, although still important.

"SPECIALIZED JUDGES" VS. "SPECIALIZED COURTS"

But to indicate briefly some of these queries as to possible change for the better. In the first place, instead of perpetuating all these troublesome questions about *jurisdiction*, whether the right action has been brought in the right court, and the like, would it not

be better to adopt, as a working principle and an ideal to be approximated in judicial organization, the concept of a single great court for the trial and determination of all cases and controversies, irrespective of their nature, the amount involved, or the basis of the relief asked? At the present time we have specialized courts—civil, criminal, surrogates', county, municipal, city, supreme and the like; we have all sorts of anomalies of jurisdiction for each court, as we have seen, and arbitrary lines of demarcation between them; if a suit is started in the wrong court, the plaintiff has all his trouble for nothing and has to start all over again. Instead of having specialized courts, would it not be better to have specialized judges, a court with complete jurisdiction of every phase of a controversy and power to do therein everything which a court can do in arbitrament and enforcement, and then the judges thereof assigned to various branches or parts, to deal there in specialized fashion with those types of litigation which they have shown themselves most competent to handle?

ORGANIZATION AND UTILIZATION OF ADMINISTRATIVE STAFF

In the second place, does it not seem fair and business-like that a court should be given *adequate administrative organization* and *adequate administrative control* over its own clerical subordinates? Courts are commonly thought of as made up of judges, a clerk or so, an officer, a stenographer, and perhaps an interpreter of foreign languages. In fact the administrative staff of a metropolitan court is a great unwieldy mass of unorganized employes, often chosen or promoted for reasons largely political, subject to no direct authority or responsible control, and utilized to a very small percentage of their potential usefulness in the administration of justice. A judicial officer on the civil side is practically marooned, so far as administrative aid in the ascertainment and disclosure of the facts pertinent to pending controversies, and yet what is the situation so far as the employes of the courts are concerned? On the civil side of the Supreme Court in the First Judicial District of New York state, comprising the counties of Manhattan and the Bronx, $660,000 a year is paid to judges, $774,000 to clerks, and $660,000 to attendants. In view of the fact that the judges receive $17,500 a year in salary, the significance of these figures is startling. Taking into account the civil, criminal and appellate branches of the Supreme Court in the same area, 22 per cent of the total salary list is for the judges;

two million dollars a year are paid to the clerical force and attendants alone. The business and administrative side, as well as the performance by the judges of their judicial function, needs greatly to be organized and modernized.

WHY IGNORE MODERN BUSINESS METHODS

Again, is not there need for a great modernization and adaptation of present-day business devices in *bringing men to court as litigants, witnesses*, and in other capacities? Is there any reason, under modern conditions, why registered mail could not be made as acceptable a method of service of a summons and complaint as so-called "personal service?" Is there any reason why most petty cases could not be as well started by mail notification from the clerk's offices? Is there any reason why the old-time system of subpoenaeing all witnesses for ten o'clock in the morning of court day after court day, by personal service of a subpoena, should be adhered to at all hazards, in disregard of modern expedients such as the telephone and telegraph which might make it possible for witnesses to remain in their offices until more nearly the time when their presence will be actually needed? Perhaps the most serious and the least excusable of all the waste of valuable time inflicted by our present legal system is the wanton waste of the time of helpless and unoffending witnesses, left altogether at the mercy of the indifference of counsel and the lumberings of a system of notification which dates back to the day when the farmer drove to the court house at the county-seat in the morning after he had finished his milking and attendance at court took on some of the aspects of a gala occasion.

Still again, ought not our judicial system for the handling of causes to be so adjusted that each case would receive, from start to finish, the *continuous attention of one trained judicial mind*, familiar with all its incidents and development, rather than the casual animadversion of many judges dealing with it in offhand and fragmentary fashion? I am impressed that one of two things ought to be done; I am not sure as yet which is preferable. The first is that all stages of the case, up to the time of actual trial, should be under the supervision and authority of a single judicial officer, to whom all interlocutory applications should be addressed, and who would really see to it that the case was in such shape as to get a fair determination of the disputed questions of law and fact on their merits. There-

after the case would come before another judicial officer for actual trial.

ONE JUDGE ON ALL PHASES OF EACH CASE.

The alternative method would be to have the same judge also try the case who had handled its preliminary phases. The present system puts the trial judge in poor position to be a factor for the working out of justice in the particular case, for it has usually been mussed and muddled, long before it came before him, by an indefinite number of judges, and he knows and can learn, in the brief time available before he has had to rule on the decisive issues, little as to the history and previous course of the litigation. In the place of our present system of handling "pleadings" and the various interlocutory applications, it seems to me that something more like the following plan would be more likely to work out acceptable and substantial justice according to the actual merits, and would greatly reduce the number of cases ever actually tried at all.

When an action is started, it should be assigned at once to *a single judge or commissioner*, to have oversight over everything taking place in the action, at least up to the time of trial. The "pleadings" or notification with which the proceeding is started need be only a brief, concise apprisal of the defendant as to the nature and amount of the claim; further details could well be left to be developed, upon the application of the defendant, under the supervision of the judge or commissioner in charge of the preliminary phases of the suit. The sole object of this judicial officer should be to get the matter in the best possible shape for the trial and disposition of the case on the merits of the actual testimony upon the issues of law or fact which give rise to, and constitute the real "nub" of, the controversy between the parties; and in doing this and seeking this result he should act in direct, open-minded fashion, according to the needs of the particular case, should act in a manner which would commonly be regarded as in part administrative rather than solely formal and judicial, should be left unhampered by multitudes of judicial decisions upon procedural matters, and should be subject to appellate review only for arbitrary action and manifest departure from the fundamental purpose which I have indicated. Most of the interlocutory matters now regarded as "special term" functions would best be taken out of the atmosphere of judicial determination and review altogether, and the judicial officer left free to confer directly with the

attorneys and their clients, consult the details and developments of the particular case, and direct therein the doings of whatever may seem best to promote the fundamental purpose of all action in advance of and preparation for trial. For example, he should seek to shape the pleadings so as to narrow and define the issues, and disclose the actual issues; he should grant, supervise, conduct examinations before trial, discovery of books, accounts, papers and the like, in the interests of justice and the full ascertainment of the facts. Most of the facts in relation to the subject-matter of an action are not in dispute; the ends of justice would be almost always served if these were required to be agreed upon, reduced to written stipulations and thus embodied in such form that the trial court and jury would have before it the undisputed facts in such definiteness and accuracy of form as to afford a good starting-point for the consideration of the questions of fact which are disputed. For example, in the case of an action against a street railway company for a crossing accident, the physical facts as to the surroundings at the intersection, the vehicles which figured in the accident, and the like, ought to be made the subject-matter of well-formulated statements and suitable photographs, as better basis for the guidance of the jury when it takes up the questions really disputed.

QUESTIONS WHICH SHOULD NOT BE IN ISSUE AT ALL

There are many matters now left within the category of disputed questions as to which the judge or commissioner ought to prepare the way to place at the disposal of the eventual trial court the results of better administrative handling of the case, with the objective of fairly ascertaining and fully disclosing the true facts ever in mind. For example, thousands of cases tried in the courts of this city each year turn upon the question of the conformance of goods delivered to sample furnished or to trade description quoted. These questions are of necessity dealt with, at present, in a court room trial, in the most crude, offhand, inaccurate manner; there is a wide and inexcusable margin of error; time and again the efforts of adroit, unscrupulous counsel and glib, lying witnesses completely fool the jury on such issues. Under a proper system such questions, or cases turning on such questions alone, would hardly ever reach a jury at all. They are questions, in the first instance not for a jury or court at all, but for a bureau of standards, trained in analysis,

familiar with trade formulas, expert in trade standards. To such a body the judge or commissioner should have power to refer a case involving questions such as I have indicated, and its expert, impartial, disinterested report upon the facts, for example, as to the ingredients of the sample furnished and of the goods delivered, should be thus made available to the trial court, if the case ever came to the point of trial. In point of fact no large proportion of commercial controversies would ever survive such a scrutiny as I have indicated in the foregoing paragraphs; the system would sound the death-knell of "strike" and "hold-up" litigation. Any system which lessens the chance of unmerited victory and decreases the possible effectiveness of the efforts of counsel to lead the trial away from the actual facts, the real merits, will greatly decrease the volume of baseless litigation. Any system likewise which leads to generous mutual disclosure, in advance, of the documentary and other evidence, and the legal and other contentions, on which the opposing claims are mutually based, will have the greatest possible effect in bringing about settlement, through compromise, concession or otherwise. As the litigants and their counsel find the controversy reduced to its lowest terms, they will find surprisingly little left to litigate about, aside from questions of law, which they will find the right sort of counsel can determine for them just about as well, and much less expensively, out of court as upon a court room trial.

There are many phases of betterments which might prove of aid to the administering of justice, each of which would be suitable subject-matter for a whole article by itself, and therefore can only be indicated within the permissible limits of this article. For example, upon the whole matter of so-called "expert" testimony, a better administrative organization of our judicial mechanism, based upon the fundamental principle which runs through the present discussion, would enable the trial court and jury to have the aid of really expert information, the advice and counsel of disinterested, qualified, well-informed specialists, whose trained observation and impartial opinions would be of real help to the jury, and would put to rout the scandalous brigade of hirelings who so often masquerade as "experts" in aid of whichever side unconscionably brings them into court. Radical change in the whole basis of "expert" testimony is one of the most important of the potential betterments in

procedure which would make for accuracy and acceptability of the results reached through the administration of justice under law.

THE WORKABLE IDEAL OF OUR JUDICIAL SYSTEM

The enforced limits of space and time forbid a similar discussion of the mechanics of court room trial and the mechanics of appellate review, although the queries already advanced have, of course, a vital bearing upon the entire subsequent history of a suit thus started. The workable ideal of our judicial system ought, in my judgment, to be as to every civil action:

> One prompt, fair, impartial trial on the merits, with full disclosure of the actual facts, and then, if either party feels aggrieved, one appeal, to a court vested with plenary power to correct, and not merely detect, error and conform the result reached below to the requirements of the correct legal rule as maturely conceived by the appellate tribunal.

Where there has been trial by jury below, and the error below has been plainly one of law, with the disputed questions of fact separably determined, the appellate court may well, in pursuance of this basic objective, be vested with broad power to award final judgment according to the facts as found and the law as conceived by the appellate court. Where the defect disclosed on appeal is one of formal or record proof, involving no question of weighing the credibility of witnesses, the appellate court may well be vested with power to permit the remedying of the defect without reversal of the whole judgment. Where error has occurred only as to one phase of the issues of fact in the case, the appellate court may well be vested with broad power, in its discretion, to remand the case for re-hearing in the Trial Court upon such phase of the issues and not upon the whole case. For example, if the question of *liability* has been determined in a negligence suit, but error has taken place on the rule of damages, need the whole cause be invariably re-litigated, or may not a re-finding on the question of damages alone be directed? Of course, on many of these things, we are still a long way in this country from the practicable ideal above quoted, but the time may not be far distant when the young men who are now coming to the bar will find themselves confronted with the task of working out the details of fulfilling an emphatic public demand in these respects.

Let no one think that this article has been inspired by any lack of appreciation of the work of our courts and the importance of the

proper discharge of the judicial function in a democracy. There is in my judgment no task more fundamental, no phase of public service or professional activity to which a young man may more satisfactorily devote his energy, vision and enthusiasm. The law I conceive to be a great, vital, *living* concept of human relationship, based on standards of fairness, reason, practicability, and effectiveness, such as have entitled it to be called "crystallized common sense," and withal fair and logical in its workings and applications. The mystification of legal procedure robs the law of its basic "common sense," and its anomalies rob it of fair, even, logical application. The task which I have outlined is therefore essential to the very life of the law. We make a mistake, however, when we conceive the administration of justice under law to be a task entrusted to courts alone. Many vital aspects of legal administration are now entrusted to regulative commissions and quasi-judicial tribunals which have been given more adequate, suitable organization because emancipated from what has thus far been our tradition as to tribunals called courts. Every young man at the bar, whether or not in a judicial office, and whether or not identified with any of those newer instrumentalities of juridical administration which link up so intimately to the whole topic of betterment in our courts, will find ample opportunity for full use of his talents and constructive abilities in the days and years that are ahead. This article is prolix and fragmentary, but if it and its companions in this volume can have any part in persuading men of the profession resolutely to "keep their eyes on the ball" and measure up to the major task which the public will shortly impose in earnest upon the bar and the courts, they will no doubt have fulfilled their purpose.

THE WORKING OF THE NEW JERSEY SHORT PRACTICE ACT

By Martin Conboy.

There are two Short Practice Acts in New Jersey, one for courts of law, the other for the court of chancery. The former became a law on March 28, 1912, and consisted at the time of its adoption of 34 sections and 83 rules. Since then the number of rules has been increased to 180, but all except 13 of the additional 97 were in force before the practice act was adopted. The latter became a law on March 30, 1915, and consists of 13 sections and 65 rules. It is with the working of the former that this paper deals.

"The wall of separation between legal and equitable relief" is still maintained in New Jersey. The Supreme and Circuit Courts administer what we call law as distinguished from equity and the court of chancery grants equitable relief. The separation is maintained not only by a difference in courts, but also by a difference in judges. The law courts are presided over by justices of the Supreme Court and the circuit court judges. The jurisdiction of the Supreme and Circuits Courts, so far as ordinary law actions are concerned, is identical. The chancellor signs all decrees in chancery and the work of the court of chancery is conducted by the chancellor and the vice chancellors. There is, therefore, a complete separation between legal and equitable relief as regards procedure, courts and judges. The court of errors and appeals constitutes an exception to this extent: All appeals, whether from judgments at law or decrees in chancery, go to that court. The chancellor presides except when the appeal is from the Court of Chancery and then he does not sit and the presiding officer is the chief justice of the Supreme Court. The court is constituted of the chancellor, the chief justice and justices of the Supreme Court and six judges "specially appointed."

I have at the outset referred to the maintenance of the separation between legal and equitable relief in New Jersey, because I consider it of importance in this respect, *viz.*: it obviates the difficulty that code states labor under in attempting to make one set of rules for courts administering two kinds of remedies.

One other feature in New Jersey having a bearing upon the working of the Short Practice Act is the nature of the judicial tenure. Judges in New Jersey are appointed and not elected. While the term of office is fixed at seven years, the experience is that good judges are almost invariably reappointed. Politics cut very little figure once the judge has gotten on the bench. I do not mean to imply that it plays the most important part in the original selection, but, as is natural, Democratic governors usually find competent judicial material in the ranks of the Democratic party and Republican governors in the ranks of the Republican party. There can be no gainsaying the fact that the judiciary is on a high plane.

These preliminary observations are of importance, because the most striking feature of the New Jersey Practice Act is the wide discretion that is left to the judiciary, which is given the power of governing the whole field of practice by means of rules. This tends to greater elasticity than is possible when direct legislation must be invoked for every alteration which experience shows to be desirable. That this discretion is wisely exercised the general satisfaction among practitioners seems amply to demonstrate. It is true that the power itself, if abused, would result in a changeable procedure, which it has been rightly said "is a grievous burden to the community, which must pay the price of interpreting all new regulations of procedure, whether by rules of court or direct enactments."[1] In England between 1875 and 1890 the English courts handed down four thousand decisions on the judicature rules and the principles intended to be worked out by them.[2] The safer principle that alterations in the law should be made only when shown to be necessary seems to be the guiding principle of the New Jersey judges in the exercise of the power vested in them. This is shown by the fact that of the 180 supreme court rules now in force, 83 were annexed to the Practice Act at the time of its adoption and all but 13 of the additional 97 were in force before the act went into effect.

The old rules adopted under the new act treat for the most part of matters not within the main purpose of the act, such as

[1] Hepburn's *Historical Development of Code Pleading in America and England, Select Essays in Anglo-American Legal History*, Vol. II, p. 682.

[2] *34 Solic. Journ. and Rep.* 244 (1890).

admission and disbarment of attorneys, calendar practice, certiorari, dower, ejectment and costs. Incidental to the mention of certiorari, there is as yet considerable doubt as to whether the act applies to prerogative writs. Of the 13 new rules only 5 treat of the main subject of the act, and these, with a possible exception hereafter noted, carry out and extend the reforms therein inaugurated.

So far as the changes in the rules indicate, therefore, the present system has given satisfaction to the judges as well as to the practitioners.

There is one other observation that should be made *in limine*. It seems logical that the courts should be permitted to build the machinery which they must operate and to make such changes therein as experience suggests. This work is more properly entrusted to the judiciary than to the legislature. Even in code states rules of court are made by the judges, and under authority that runs back to the Act of 1792 the Supreme Court of the United States has made the rules under which the equity and admiralty jurisdiction of the federal courts is administered. The idea, therefore, of judge-made rules is neither unnatural nor unusual. Historically the entire field of practice was originally the work of judges. Of course, the success of such a system rests immediately upon the personnel of the bench, but it must rest either there or upon the personnel of the legislature. Undoubtedly the high quality of the New Jersey judiciary and also the distinction in qualification arising from the division that is still maintained in that state between law and equity have made easy the operation of the act we are considering. One circumstance in particular is to be emphasized. The attitude of the bench toward the reform has been generally sympathetic and in some instances enthusiastic. This is important. It was in a large degree the lack of sympathy for the Field code that led to its technical interpretation and the failure of its immediate object—the simplification of procedure.

The New Jersey Practice Act has gone further than permitting the judges to make rules. It provides that the rules may be relaxed or dispensed with by the court in any case where it shall be manifest that strict adherence to them will work surprise or injustice. This power is no less important than the power to make rules. It creates a condition of flexibility which permits the courts to remove the reproach against the administration of justice that has continued

to this day, *viz.*, that too great a price is paid for technicalities. It is probably not too great a generalization to say that most of the difficulties encountered in the administration of justice in courts of law, that is, in the administration of the procedure of such courts, result from the necessity on the one hand of preventing, through the allowance of liberal amendments, a failure of justice by reason of technical errors, and on the other hand, of penalizing litigants for mistakes, the correction of which would delay and, therefore, deny prompt justice to the meritorious suitor.

An example of the way in which a balance is being struck in New Jersey, as well as the flexibility gained by a liberal discretion in the judges, is suggested by the following observation in *Titus* v. *Penna. R. R. Co.*, 87 N. J. L., 157:

> It may well be observed in this connection that by rule 5 annexed to the Practice Act, now rule 218 of the Supreme Court, it is provided that the rules may be relaxed or dispensed with by the court in any case where it shall be manifest that strict adherence to them will work surprise or injustice; and the query naturally arises whether, where contributory negligence appears from the plaintiff's case upon the trial, being theretofore unknown to the defendant, the rule of pleading ought not to be relaxed, so that the defendant may have the advantage of that defence without having put it in issue, as that was impossible. This question however, is not pressing for solution, because the facts constituting contributory negligence, if there were such negligence in this case, were known to the defendant before the trial.

A further insistence on the flexibility of the act is found in *Kelly* v. *Faitoute Iron & Steel Co.*, 87 N. J. L. 567, in which the striking out of a counterclaim was upheld because it could not conveniently be tried with the principal action. In *Murphy* v. *Patton*, 85 Atl. 56, the act received the longest discussion found in any case, but it is noticeable that none of the discussion arises from any obscurity in the act. In the former of these two cases the question of counterclaiming for tort in actions of contract and in the latter that of the joinder of actions in tort and contract were touched upon. The latter practice was stated as permissible under the clear words of the act and the former, it was intimated, would also be allowed. In both cases the emphasis is put in a most refreshing manner upon the convenience of trial rather than upon technical distinctions. When we consider the volume of solemn nonsense that has been expended on similar subjects under the New York Code such an attitude may well cause satisfaction.

Next to the wide discretion reposed in the judiciary, one of the most prominent features of the Practice Act is the provisions relative to appeals. The striking difference between the practice thereunder and that under the New York Code is the prohibition of appeals from interlocutory orders. No more effective instrument of delay could be invented than the New York practice of carrying overruled demurrers and every disagreement as to an examination before trial or a bill of particulars to the Appellate Division. This evil, to be sure, is the creature of the Code System. Writs of error were never allowed at common law nor under the former practice in New Jersey until after final judgment, it being observed by Chief Justice Beasley that a contrary practice would lead to "the most serious vexation and delay."[3] The present act allows appeals only where writs of error were formerly allowed.

Another and more novel feature of the new practice is the limitation of new trials to the "question or questions with respect to which the verdict or decision is found to be wrong if separable." This rule has been beneficially applied in at least three cases appearing in the official reports. The accompanying rule that "when a new trial is ordered because the damages are excessive or inadequate and for no other reason, the verdict shall be set aside only in respect of damages and shall stand good in all other respects" has, however, been criticized by a writer in the New Jersey *Law Journal*.[4] Such a new trial, in the case of a compromise verdict by the jury, may result in practical injustice.

In an interview, which has proved illuminating upon the whole subject of this paper, Justice Swayze of the New Jersey Supreme Court drew attention to probably the only question under the Practice Act which has given rise to a considerable difference of opinion. In *Kargman* v. *Carlo*, 85 N. J. L., 632, and in *Miller* v. *Del. Riv. Trans. Co.*, 85 N. J. L., 700, the Court of Errors and Appeals has held that objections must still be taken to the rulings of the trial judge in order to lay the basis of an appeal. It is a question whether this was the intention of the framers of the act and whether the holding does not constitute a retrogression toward technicality. This decision was later embodied in a rule of court but an amend-

[3] *Cooper* v. *Vandeveer*, 47 N. J. L., 178.
[4] 38 N. J. L. J. 98 (1915).

ment by the legislature[5] reversed it in regard to causes submitted to the court to be heard without a jury under which circumstances "any error made by the court in giving final judgment in the cause shall be subject to change, modification or reversal without the grounds of objection having been specifically submitted to the court."

Another innovation brought about by the act under consideration is that of suing defendants in the alternative. A question has been raised[6] as to whether a defendant could be sued alternatively as an individual or as an executor. But in another case[7] the practice seems to have worked well. In the latter case a carpenter having done certain work in the interior of a building sued both the company that rented and occupied the building and the manager of the company who also held an option for the purchase of the building. It was this manager who had hired the carpenter and the capacity in which he had acted was in dispute. The jury held the company and released the manager which verdict was upheld on appeal. The court's observations on the question of appeal in such a case illustrate the working of the practice.

> There is another reason, founded on the bringing of the suit in the alternative, that should lead to a discharge of the present rule. On any reasonable theory of the case, a verdict against one defendant required a discharge of the other, and so the jury found. Now, if that verdict is brought in question, the other defendant should be heard as well as the plaintiff; for the natural inference in a case of this kind is that if the verdict against one defendant is wrong, the other defendant should have been held; and this the other defendant must be heard to controvert. Again, if the verdict be set aside as to the company, there ought to be a new trial as to both defendants, for if Steuerwald's verdict stands, peradventure a second jury will find the company not liable, and the plaintiff, though plainly entitled to be paid by one or the other, gets nothing from either. In such a case the rule should require both the plaintiff and the alternative defendant to show cause, and include both verdicts.

Difficulties of the kind that give rise to alternative pleading may sometimes be met, in jurisdictions where such pleading is not allowed, by alleging that the defendants are jointly liable and subsequently amending when the facts are discovered. The evils of such methods are obvious. Moreover where two suits are neces-

[5] L. 1916, p. 109.

[6] *Pfeiffer* v. *Badenhop*, 86 N. J. L., 492.

[7] *Crowe* v. *Perth Amboy Publishing Co.*, 85 N. J. L., 476.

sary there is always the danger of losing both although the liability of one of the two defendants is certain. The New Jersey procedure is perhaps liable to abuse but such has not come to the knowledge of the writer, who believes that provision to be beneficial.

Much of the simplification introduced by the act is a simplification of nomenclature rather than of procedure. The substitution of motions for demurrers and pleas, and of appeals for writs of error is of this character. The preliminary reference or "omnibus motion" introduced by the rules does not seem to have been frequently used by the bar and little, therefore, can be said of its practical usefulness.

A simple and expeditious method of examining adverse parties before trial before a commissioner without first securing an order for the purpose has been added by the legislature.[8]

The liberal rules as to joinder of parties plaintiff form a valuable part of the new system. As an example, a case in the litigation of which the writer is now engaged, was brought in which father and son were both joined as plaintiffs in a complaint for personal injuries to the boy. The difference between this single suit and two separate suits may not be in itself very considerable, but each instance of the kind constitutes a saving in efficiency which in the aggregate may be quite appreciable. Much more striking instances of this advantage may undoubtedly be found such as might occur in case of a railroad collision injuring many people.

In the domain of pleading the advance toward simplicity attained under the Practice Act has been noticeable. It is here that as an improvement of the practice of the state the reform has been most successful. At first there was a widespread impression among the bar that a complaint henceforward was to consist of a kind of newspaper report of the occurrences including all the circumstances and evidence. This false impression corrected, everything has worked well. Lawyers have had the benefit of the precedents of the English practice, and judges have repeatedly recommended a study of the forms of Bullen and Leake. The result has been a clear, simple method of pleading which must in every way have fulfilled the hopes of the reformers.

It may be too much to claim for the act that it solves the problem of procedure in courts of law, a problem that has engaged the

[8] L. 1914, p. 151.

attention of the best legal minds for centuries. Whether the brevity and simplicity of the system which constitute its great merit will prove permanently successful cannot be determined until after a considerable period of years, during which the system has manifested its ability to meet new demands and new conditions as they arise, but certainly thus far the results amply justify the expectations of its framers that the simplification of procedure by a concise and flexible body of rules formulated and applied by an able judiciary will be a great aid to the proper administration of justice.

PROGRESS OF THE PROPOSAL TO SUBSTITUTE RULES OF COURT FOR COMMON LAW PRACTICE

By Thomas W. Shelton,

Chairman, Committee on Uniform Judicial Procedure of the American Bar Association, Norfolk, Va.

Governmental improvement in republics, or a departure from long standing policies or customs, is so correlated with a popular understanding of its merit and need as to render the latter a condition precedent to achievement. Inasmuch as that condition is a true reflex of representative democracy it is not to be criticized, but should be recognized, preserved and wisely used in the interest of the general welfare. It is visualized in the processes of garnering intelligence by an intellectual free people. So it is that time profitably lapses while the conscientious legislator seeks his constituents' views on proposed new legislation. Preparing these constituents by imparting and popularizing the necessary knowledge thereby becomes the key to the door of success of any proposal, as it is the measure of the strength of a democratic government. Obviously then, this duty rests with those citizens best prepared and possessing the confidence of the people, the performance of which is evidence of the most supreme public spirit.

The Three Necessary Stages

It is the fate of every new measure proposed to a democracy to pass through the three distinct ordeals of investigation, education and legislation. Once approved by the accepted leaders of national and state thought, specially circumstanced to pass judgment upon it, and whatever its origin, the idea is properly credentialed for presentation to the masses, whereupon, the serious, highly responsible and patient work of education begins. The thoroughness and earnestness with which this is done, in the absence of some catastrophe impelling immediate legislative action, will measure the chance of successful, or speedy enactment into law. There is one exception to this rule, the cause of which is obvious to every lawyer—the reform of the procedure of the courts—the American history of

which we shall now outline, intermingled with a little philosophy and preceded by a short introduction. In this matter the people must trust their trained lawyers instead of politicians, just as in medicine they follow their experienced doctors.

SIMPLICITY ITS FEATURAL MERIT

There are few functions more highly technical and scientific than judicial procedure and which, when improperly applied, can become more wicked in results. There are few agencies that demand less simplicity in form and use or are worse impaired by mystery or technicality. Illustrated in nature, there is no element more useful and at the same time more deadly than electricity, and none requiring simpler methods of application. The vision of the unthoughtful never reaches or measures the research, concentration and highly perfected program of the philosophers and engineers who came so to understand the science of this necessary danger to mankind as to make it safely its servitor. But, once the scientific hand is removed from control, and the influential novitiate occupies the seat of experience and wisdom, it would revert to destructive methods, for it is axiomatic that ignorance meddling with science always brings its own punishment. Here is visualized investigation followed by education, resulting in economic utility.

DANIEL WEBSTER'S APPRECIATION

There is no human consideration of more importance than an acceptable administration of justice and few that are less appreciated and understood. Said Daniel Webster,

> Justice is the greatest interest of man on earth. It is the ligature which holds civilised beings and civilised nations together. Wherever its temple stands, and so long as it is honored, there is a foundation for social security, general happiness and the improvement and progress of our race. And whoever labors upon this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher to the skies, links himself in name, fame and character with that which is, and must be, as durable as the frame of human society.

SOCIAL HISTORY RECORDED IN THE COURTS

The world history of ethnogenic sociology may be traced through the courts, for there evolution leaves its trail in the last resort of all serious disputes and the interpretation of statutory

rules of conduct. Advancement is translated in England's Judicature Acts of 1873, when scientific court rules were established in the place of technical common law procedure. It was a spiritual revolution translating a matured sense of civic responsibility. Deliberate education and evolution is evidenced in the propaganda, beginning about 1821 and ending in 1835, to simplify pleading and procedure. It is then the seeds were sown that fructified forty years later. So it is seen that the commercial and ethical, as well as the social standards of every government and people, are reflected by their courts.

THE GENIUS OF THE JURIDICAL STATUS

Inasmuch as a reasonable and uniform justice depends upon the scientific and logical limitations and regulations thrown around the human element of these tribunals, their juridical status was, is and always will be, of first importance. More important than the form of government is the spirit that animates government. Judicial procedure fixes the condition, the time and manner as to which one may seek the use of the courts; it prevents surprise, oppression and a subsequent attack on the same issue; it makes the humblest man the equal of the strongest, and it confines the oppressive hand of the government to the orderly method open as well to every citizen. It thereby becomes the measure of civil liberty and of property rights. The history of the common law procedure and the substitution of rules of court, as has been said, is the history of the evolution of a great nation from a people, declared by Macauley to have been "outcasts and a by-word" following Cromwell's protectorate. Indeed, it reflects the very genius of government itself.

THE ATTITUDE OF LAYMEN TOWARDS JUDICATURE

The history of all time shows that qualifications for self-government are not innate in a people. Therefore associated with their absolute power in a democracy is a concomitant duty of obedience and respect for the authority they have found necessary to vest in certain individuals, if not for the individuals themselves. The abandonment of the arbitrament of arms for judicial settlement of disputes connotes the necessary individual submission. But, the consciousness of surrender of these natural rights breeds an almost

unconscious zealous and jealous watchfulness and suspicion. Many minds are regretfully set against the government. This human passion is reflected in America in political campaigns. In less organized countries it manifests itself in insurrection and civil war. In 1861, America furnished the most serious example, from the symptoms of which one is inclined to conclude that human nature is basically the same though differing in philosophy, discipline and refinement. Therefore, if the people shall rule, justice in a reasonably certain measure must be ascertained and administered, not popularly, but scientifically by fixed correlated rules, lest principle be sacrificed for expediency and the necessary popular faith fail from lack of respect.

ATTITUDE OF LEGISLATORS TO JUDICATURE

While these thoughts are peculiarly applicable to the courts, the legislative bodies that create their machinery, and necessarily control their fate, cannot logically be omitted from consideration. Said John Stuart Mill, "There is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws." Organized society has no more dangerous enemy than a legislative incapacity to distinguish between personal pride of opinion and the general welfare. The courts are the worst sufferers from this conceit through the presence of reactionary or poorly prepared lawyers in legislative bodies. It is in the power of a few such men to prevent all advancement. This is not uncommon in America, for "no man is so merciless as he who, under a strong self-delusion, confounds his antipathies with his duties."

THE AWAKENING OF THE PEOPLE

The stern exigencies of painful results shocked the American people from a state of pensiveness less than a decade ago. Gradually, a characteristic zealous and jealous watchfulness matured into a militant propaganda that is evolving into progress, is emancipating men from the senseless slavery of partisanship and is bringing them to a highly conceived sense of neighborhood responsibility. They are individually seeking the light—the surest symptom of a robust intellectuality. The appetite for investigation

into all public affairs increased with knowledge, which has not been withheld.

THE AMERICAN BAR ASSOCIATION ENTERS

It was the consciousness of these facts that galvanized an erstwhile complacent bar into an energetic, cohesive force. This fertile field for popular education held out a beckoning hand to the great American Bar Association to which it heartily responded in 1911, with the organization of its Committee on Uniform Judicial Procedure, charged with the duty of educating the people on the relation of the courts to government and their duty to the courts, and to set them free from legislative domination to the end that justice might be scientifically and uniformly administered. And thus began the first organized propaganda with the distinct object of bringing popular support to the courts, through a popular acquaintance with them and the organic functions of the judicial department of government in order that the processes of perfecting the courts might be understood and appreciated, and that suitable demands might be made upon their representatives in legislative bodies. The splendid success attending it has well justified the effort.

A LEGISLATIVE CONVERSION

Eight years ago, Honorable Reuben O. Moon, then chairman of the Committee on the Judiciary of the House of Representatives, in a letter to the writer, deplored the hopelessness of juridical remedial legislation because of a "lack of trust by Congress in the courts," and that Argus of the people, Everett P. Wheeler, continued to knock vainly upon the congressional doors for temporary relief from conceded wicked incompetency and useless technicality. Today a different atmosphere prevails. So great has been the change in representative sentiment and official thought that, two years ago, the same committee, presided over by Hon. Edwin Y. Webb, unanimously spoke these words:

> While your committee could not close its eyes to the material aspect of the matter, as expressed in unnecessary tolls upon commerce, it has looked higher and viewed the courts as governmental agencies, the obstruction of which or the weakening of the faith in which means a blow at the very vitals of constituted government. We do not venture to give expression to the evil consequences that would follow. It has been truthfully said:

"The executive and legislative departments of government could cease their activities for a given time without other harm than serious inconvenience; but the suspension of the functions of the courts for one day would mean anarchy—might and not right would be the measure of civil liberty and property rights."

But Congress likewise has a personal and selfish interest in developing the courts to the highest efficiency. As the agencies through which the law is administered, they absolutely measure the potency and dignity of the statutes enacted by Congress. These laws are no better and no worse than the manner in which they are administered. The courts have been compared to the pipes that convey water into and about a city. It matters not with how much pure and wholesome water the great reservoir has been provided, the quantity and quality actually received by the people is measured absolutely by the condition of the pipes in which it is conveyed. If they be clogged or foul or insufficient so will the supply actually reaching the people be unhealthful, insanitary, and insufficient. Congress, therefore, owes to itself and its popularity, apart from its sacred obligation to its constituents, to face this problem promptly that it may be solved, and no solution could be more appropriate than that which has met with such universal indorsements as the bill recommended. Indeed all responsibility for its success is virtually lifted from the shoulders of Congress to that of the great lawyers and teachers who unanimously commend it and demand it. It is under the influence of these thoughts that we enter into a more detailed presentation of the reasons that constrain us to recommend for immediate adoption the American Bar Association's federal procedure bill.

Congressman Moon might well have reflected upon the prediction of Madison that, if this government ever fell it would be caused by the trespass of the legislative upon the judicial department of government. Or else, like thousands of awakened citizens, upon the declaration of the sacred Virginia Bill of Rights,[1]

That the legislative, executive, and judicial departments of the state should be separate and distinct; and that the members thereof may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken.

THE AMERICAN BAR ASSOCIATION'S PROGRAM

The American Bar Association's program, visualized in a model statute designed to establish an equable division of power between the legislative and judicial departments of government, merely vests in the Supreme Court of the United States the power to substitute rules of courts for the present statutory, or common law procedure, and to prescribe all other regulations of detail for the

[1] Section 5.

operation of the *nisi prius* courts. The simplicity and logic of the program and its foundation of fundamental principles caught the public fancy and has grown steadily in esteem. Failure of justice had thereby served a useful purpose. Like the proposed rules, the well matured scheme embracing them, state uniformity and fixed interstate judicial relations, needed no elucidation and were free from the metaphysical subtleties and mystery that seem to have long narcotized the traditional unselfish patriotism of the great majority of the members of a noble and highly responsible profession. But the American Bar Association's action was unanimous, which, while furnishing the proper inspiration to the lay public, leads us directly to the dark days of investigation—to the history of the years preceding this successful campaign of education, for it was a carefully devised and far-reaching program.

IT UNDERWENT A RIGID INVESTIGATION

In the beginning, Roscoe Pound, one of the great doctors, literally pioneered and manned the ship of investigation alone. He refused to be placated with the expediencies of temporary statutory patchwork but demanded the substitution of a model system of scientific, correlated rules of court for the anachronism of common law procedure, or the empiricism of code pleading. His watchfulness generated a skepticism that resulted in a criticism of all proposals until that of the American Bar Association of 1911, unanimously approved by Henry D. Estabrook's committee, which met with his entire approval and generous support. The list of other supporters, with a few rare exceptions, is the list of the great lawyers, judges and teachers of this great country. Mr. Taft had, in messages to Congress, officially endorsed the principle involved and, in and out of season, had demanded action. It was under his inspiration that the program took shape and under the encouragement of President Wilson's Kentucky address that it was proposed to the bar association. President Wilson, unofficially, in private correspondence and in speeches in Kentucky, Springfield and later in New York, pointed out the obvious need of juridical improvement and declared that the bar association that achieved the result would become the creditor of mankind, but he has never spoken officially, which is the cause of congressional delay.

THEIR APPROVAL ASSURED SUCCESS

But when the critical investigators became enthusiastic teachers, the success of the organized campaign of education immediately instituted was assured, however long deferred by a few unappreciative legislators. State by state, the organized lawyers rose to the occasion for the first time in the history of the world, magnanimously sank all pride of opinion and enthusiastically endorsed the entire program until forty-four states are upon record. But another record has been broken. The presiding judges of the several state appellate courts and the federal circuit courts of appeals organized in 1913 a permanent annual conference, now officially designated as the Judicial Section of the American Bar Association. This was the first formal convention of judges in American history, if not in the world. These were followed by civic organizations like the National Civic Federation, presided over by the lately lamented Seth Low; commercial organizations like the National Association of Credit Men, with J. H. Tregoe as manager; the Southern Commercial Congress; the Chamber of Commerce of the United States and the Commercial Law League of America.

A PRACTICAL AGENT AT WORK

The most intelligent propaganda has been conducted by the American Judicature Society, of which Herbert Harley is the secretary and many national lawyers are directors. It presents model forms as exemplifications of accepted theories and thus reduces conjecture to the concrete. A conspicuous example is a complete system for the correlation of state courts prepared by Chief Justice Sidney Smith of Mississippi, that will eventually command national attention. A schedule of rules is also being prepared by the American Judicature Society with Samuel Rosenbaum, of the Philadelphia Bar, as draftsman.

WHERE IT IS IN OPERATION

It is doubtful if any other national program ever received such enthusiastic endorsement and militant support. The state of Virginia, in 1917, forsook her patchwork common law procedure modified by statute that had become a fetish, when her legislature unanimously enacted the principle of rules of court, yet to be put

into effect. New Hampshire and Connecticut had long since embraced it and New Jersey had gone as far as its Constitution permitted. Colorado followed. The chancery side of the federal courts as well as the admiralty and bankruptcy courts has been most successfully operated by rules of court, and in every new federal tribunal, rules and not statutes, regulate the pleading and procedure.

WHY HAS NOT CONGRESS ACTED?

And yet the necessary federal legislation has not been enacted. It has been the victim of the opportunity for suppression by a committee and the power of preventing a vote on the Senate floor. It is believed that a powerful public sentiment has made these selfish obstruction tactics politically inexpedient or a thing of the past. Although unanimously and promptly recommended by the Judiciary Committee of the House, it was held in the Senate Committee five years and finally favorably reported at the last session too late to survive the personal disfavor of five senators who possessed the power to defeat the organized bar, speaking for the American people. It must now begin *de novo*. These thoughts inspire the remark that while the administration of justice is too sacred a thing to sink to the level of political partisanship, it is not too far above the heads of those enjoying political preference for a realization, that the same great and much wooed power supports both—the people of the United States—for this has become their battle. They see in it the spirit of pioneer simplicity vitalized by the teaching and sacrifices of America's best lawyers and judges. Thus the next campaign of education may be profitably conducted in a different field.

COMMON LAW PROCEDURE ALMOST ABANDONED

Common law procedure no longer possesses a partisan. It still has a precarious foothold in Florida, Maryland, Michigan, Mississippi, Illinois and West Virginia, with the aid of "statutory amendments," the crutches upon which decrepitude has hobbled for more than half a century. Michigan, Mississippi and Illinois are in the throes of an energetic campaign led by men whose names are synonymous with public virtue and patriotism. A committee of the Mississippi State Bar Association, inspired by Chief Justice Sidney Smith, has prepared and submitted a practical program for the

complete reorganization of the state judicature which was published by the American Judicature Society. This will, in due course, be personally presented to and should receive the direct approval of the people when its enactment into law can no longer be prevented.

THE PSYCHOLOGY OF COURT RULES

To the observant a psychological aspect protrudes itself that cannot be underestimated. The sense of responsibility will awaken a new and unselfish interest on the part of the lawyers and will inspire their best efforts. Personal pride will play an important part in inducing them to support and maintain the new régime that would owe its existence and gradual improvement in large measure to the aid contributed by them. This is really the human crux of the whole scheme. Moreover, it will give to the people the benefit of the sympathetic direction of their ablest lawyers and will guide criticism in a harmless manner to a personally responsible and responsive agency. Lawyers will be transformed from the hostile juridical critics that they are now forced to be, into the helpful supporters they should be, as officers of the court.

LET US HAVE A HIGH JUDICIAL COMMISSION

We have spoken of the gradual improvement of the proposed system of rules which is as important as formulating them. This implies a central agency to receive, analyze and formulate suggestions from the bench and bar. This is the English custom, and some organization is essential. Dean Wigmore suggested a "Superintendent of the Courts." Accepting the principle, but expanding the idea for the purpose of economy and greater usefulness, we suggested an uncompensated High Judicial Commission to meet bimonthly, and composed of the attorney-general or solicitor-general, a member of the Supreme Court of the United States; a United States circuit and district judge; two state appellate court judges; two law teachers and four practicing lawyers. They would have an office and a paid secretary located at Washington who would receive and distribute to the members all communications from the people, the bench and the bar. These would greatly aid and stimulate the members of the Commission in their personal observations and deliberations.

SOME CONCLUDING THOUGHTS

If, without presenting the scientific merits of a system of rules of court and its advantages over common law procedure, the common law procedure modified by statute, and the code practice, a sense of gratification is felt that will be a satisfying evidence of the success of the campaign for the modernization of the courts. It will be an inspiring reward for the time and money patriotically invested by interested lawyers, who have unselfishly labored against legislative indifference or obstinacy. Success is assured the moment the American Bar Association's federal procedure bill can be brought to a vote in the United States Senate. That is the answer to the inquiry of progress! Edmund Burke has well expressed the sentiment of the modern judges and lawyers, "Applaud us when we run, console us when we fall, cheer us when we recover, but let us pass on—for God's sake—let us pass on!"

AN EFFICIENT COUNTY COURT SYSTEM

By Herbert Harley,

Secretary, American Judicature Society, Chicago, Ill.

Our judicial system hardly makes a pretense of affording good service to the greatest number of litigants. The courts frequented by persons whose claims involve small amounts are seldom considered in respect to reform of judicial procedure. Lawyers are little concerned with the conduct of inferior courts. No considerable part of their income is derived from this source. Practice in them is limited to young lawyers eager for experience but willing to give up this "chicken-feed" business as soon as their situation permits.

This is a principal reason why these popular tribunals escape serious criticism. It is easier to make a joke of them. The few serious opinions voiced are profoundly skeptical. Here and there are found capable magistrates and judges and the belief prevails that inferior courts can never be better except as they chance from time to time to obtain the services of judges who combine knowledge of the law with energy, courage and tact. Such instances are purely fortuitous. A common idea of representative institutions is that they can be expected to do no more than represent the meanest ideals of the community.

Here seems to be the real trouble: that we have not thought of shaping a system that would attract to this arduous service exceptional qualities, the best that the community possesses. We most lack an ideal of what a local court of limited jurisdiction may become, notwithstanding the fact that certain other countries have solved the problem. It is true that we have a healthy movement looking to the reformation or effacement of the petty tribunal in the large city, where it has been corrupt as well as incapable, but in rural districts the problems of inferior jurisdiction will persist.

More than half of the people of the United States live in counties that are classified as rural or semi-rural. In number of causes and in number of litigants these lesser courts will always exceed the more formal and dignified courts of full trial jurisdiction. Failure in this field of judicial administration is a disgrace as well

as an economic burden. Our civilization is weak and pretentious until it finds a way to dispense real justice for the largest class of suitors in the country. Success cannot be left to depend upon remote contingencies. The county is the natural political unit for the structure of local courts. There are few counties so sparsely settled as to afford insufficient scope for a real judge. Such counties can be linked to others for administrative purposes. And there are comparatively few with populations large enough to make this an urban problem.

Our present inferior court systems exemplify our powerful inclination toward decentralization. They are courts of and for the people living in town and country. This is an inevitable and not unreasonable condition. The fact that they are democratic is no valid excuse for inefficiency. It is an unfriendly idea of democracy which excludes efficient service. Democracy, like every other ideal, must justify itself by its works.

In nearly every state the lowest of our judicial hierarchy is the justice of the peace. Among people of high capacity for self-government this office has degenerated until it possesses no dignity and no reward. The occasional capable justice cannot offset the prevalent Dogberry type and his dependence upon fees tends powerfully to undermine his integrity. Having little or no supervision the office is deprived of the expert guidance which might improve its quality. There is as much good material in the average community for public service of this kind as ever; but we have created an environment which effectually excludes wisdom, talent and pride of service.

In many of the states there is also a County Court presided over by a lawyer-judge and serving the people of the largest town fairly well in respect to small causes. Where there is no County Court it is customary to establish in the larger towns special courts so that tolerable service is afforded residents of these favored localities.

Here exists the material for the construction of an ideal machine for administering justice in the average county. Let there first be one County Court having jurisdiction to a certain extent throughout the county. In most counties one county court judge would suffice. This one county judge should have such powers as would permit of holding him responsible for the administration of justice up to the limit of jurisdiction conferred upon his court.

In counties not exceeding forty thousand population one judge could take care of all civil causes involving not more than $500 and all criminal causes of the grade of misdemeanor. If he is given also all non-contested probate matters the establishment of the proposed system would nowhere add a cent to public expenditures and in many counties would effect a considerable saving.

The county judge should be empowered to hold court anywhere in his county, taking justice to remote parts, rather than requiring numerous parties and witnesses to travel a considerable distance. His court should always be open at the county seat, or most populous town in the county, but there should be regular days, weekly or monthly, for holding court in lesser centers.

This simple and flexible system will provide for nearly all of the civil causes. But it will be found desirable to have branches of the County Court, or deputies of the county court judge, at convenient points in the rural districts for speedy action when criminal process is applied for. The justice of the peace, properly adapted to this function, may well serve as deputy judge. The fact that he is a layman will be no objection because he will be guided by his responsible superior. An authorized stipend should take the place of random fees.

To avoid confusion let us call this reformed justice a district magistrate. There is no need for providing such an officer for every township or supervisor district. The number of magistrates should be adapted to needs. A number from six to ten would be enough for most counties. The county should be districted to give a proper area and population to each. In most cases the district could include a village conveniently reached by every inhabitant of the district.

The method of selecting these magistrates is of first importance. They should be county officials and, since they are to serve with the county judge and under his supervision, he should have a voice in their selection. At the same time it may be well to protect the judge from undue solicitation. A happy compromise seems to be reached in the proposal that the magistrates should be appointed by the county board with the consent of the county judge. Tenure should be for good behavior or until the county board and county judge concur in retiring them. Compensation should be in accordance with the volume of business done. Very good services could

be obtained in many places for $100 a year and probably $500 would suffice for those most frequently called upon.

The jurisdiction of the magistrates should be most elastic. The idea is to encourage the use of these local Solomons as long as they please their constituents and to permit of passing over their heads whenever distrust is evidenced. They might well be empowered to decide any civil suit within the county court jurisdiction when all parties wish them to do so. They should be permitted to function in all matters expressly assigned to them by their superior. Finally the county judge should have power to remove any matter from them for his own consideration at any time before judgment is rendered, and to grant a new trial at his discretion.

As to issuing warrants it is presumed that they would act under instructions of the county judge whenever his council is available and according to rules laid down by him at other times. They should have power to try in cases of misdemeanor with the consent of the accused and of the county judge.

It is presumed that magistrates will not impanel juries. The farce of the jury trial presided over by the lay judge must be abolished. Under a responsible system there would be fewer jury trials, and such as are demanded should be conducted by the county judge at one of the regularly appointed places for holding county court trials. A jury of six is large enough for such a jurisdiction, and if the judge is not permitted to express his opinion of the evidence, a verdict should be permitted by five jurors.

Now we have projected a simple, economical responsible local court system adaptable to the great majority of counties. It utilizes existing agencies with a minimum of departure from current practice. It is easy to picture its operation in the typical county where there are telephones and reasonably good facilities for travel. Every inhabitant of such a county would have an arm of the court within an hour's travel from his doorstep. The entire system would be managed by one responsible judge, easily the most important and dignified official in the county. Every litigant would have his choice between his home magistrate and the county judge and this arrangement alone would go far to obviate the heart-burning, the vindictiveness and the feud-quality of local litigation. Litigation would be economical and at the same time would possess that quality of satisfaction and finality which is to be sought above

all else. There would be few appeals and these could be heard by the circuit judge on a record made up by the County Court, obviating our present foolish but necessary plan of trying all such appeal cases *de novo*.

In counties having more than forty thousand population there could be an associate county judge, answerable in a ministerial way to the senior county judge. In counties not too populous these two judges could fill the field so well as to leave room for only a few lay assistants. Specialization could raise the efficiency of each of these judges to one hundred per cent. One could sit most of the time at the largest town while the other went about the county on circuit, or they could specialize on civil and criminal calendars. The need for special economy in certain causes, expressed by the creation of the Small Debtors' Courts in Kansas and Oregon, would be met without any special machinery. The system would be flexible enough to keep abreast of social demands without special enactment. One clerk would suffice for the entire county system and he should be the clerk of the Circuit Court. Each district magistrate would be a deputy clerk for his district. A deputy sheriff in each district, paid by fees, and a special deputy sheriff to accompany the county judge on circuit, would obviate the need for local constables and insure responsibility in the executive arm of the court.

This essentially local and democratic system can retain popular selection with prospects of high success. The county is a wieldy district from the short ballot standpoint. All the voters of a county are fairly well informed of the reputation and general qualifications of the local bar. The office of judge would be a conspicuous one. A non-partisan ballot for nomination and election would work well in so small a constituency. The term should be for a reasonable period of years. If any improvement is sought in methods of election it should be by permitting the judge, at the end of his term, to "run on his record." Under this plan the voters would vote yes or no on the question of reëlecting him. This would insure reëlection unless there were substantial reasons for retiring the judge, and this is as it should be. Judges must be independent and this implies freedom from undue menace. The common method of electing judges injects into the mind of the judge in numerous causes that very personal interest which is most rightly condemned

as incidental to the judicial recall. The public must give judges reasonable assurance of continued service if it is to compete successfully with the rewards of private practice. Security of tenure has the practical advantage also of making up in part for moderate salaries.

Without departing from our tradition of local government it is possible to develop certain proposals which would strengthen our model County Court. With such courts in all or nearly all the counties of a state they should be considered as forming together a county court division of the state judicial system. The county court judges should have a state organization and should meet once in every year to compare methods of administration. They should make full judicial and administrative reports monthly to a supervising judge of County Courts whose duty it would be to digest and publish these statistics, to counsel with county judges regarding their unusual problems, to provide for uniformity in administration and reporting, and to suggest means for simplifying procedure and economizing effort. It might well be the duty of the supervising judge to visit all counties periodically.

If there were in such a state a thorough coördination of all judges, such as is implied in the newer ideal of a unified state court system, the county court division could be even more usefully coördinated. The county judge could be a local master for the Circuit Court. He could also officiate in the trial of felony cases by direction of the circuit judge and so reduce the number of days of jail confinement for prisoners awaiting trial.

It may be said finally that any such system implies large powers for self-regulation. This means that the county courts should not be tied down to a minutely legislated code of procedure. The statutes should determine the larger elements of procedure and confer power upon the county judges in annual assembly to amend the schedule of court rules. In administrative matters each judge should have a free hand subject to supervision by any judicial council of the state charged with this general responsibility. A judge not to be trusted to use common sense in the ordinary business of his court cannot be trusted to give good results under the most rigid and minute of legislated codes. Supervision and responsible personal direction should take the place of statutory control. No amount of statutory law can make an efficient official out of in-

different material but it can easily defeat good results from capable officials. In the judicial field minute and rigid procedure only serves to multiply litigation and make it a matter of form rather than of substance.

The real check upon abuse of power and failures of omission must come from enlightened public opinion. The field of the local judiciary is ideally subject to the discipline of public opinion when adequate power and freedom exist. It has the further discipline afforded by the bar and that arising from the right of the disappointed litigant to have a higher court pass upon his cause.[1]

[1] Readers are referred to *Bulletin VII-A*, American Judicature Society, for a draft of an act to establish a county court system as projected above, and to make it a coördinate part of a unified state court system. The only state in which a serious effort has been made to improve inferior courts in rural districts is New Hampshire. See Laws of 1913, chapter 169.

A JUSTICE FACTORY

By Frederick D. Wells,

Justice, New York Municipal Court; Author of *The Man in Court.*

When the second-story man receives a fourteen-year sentence on his third conviction for burglary, he cries out that he has not had justice. When the stout lady loses her case against the trolley company, because she is guilty of contributory negligence, she says that there is no such thing as justice. For justice in the abstract is nobody's concern. Even the social economist talks too much about justice. The terms, "justice and the law," "the value of precedent," "the formulae of equity," "the social value and scope of courts," are abstract phrases which seem more appropriate to an eighteenth century school of thought than to modern conditions.

The concrete question is, "What is the demand and what is the supply?" The demand is for the settlement of civil disputes and for the punishment of the community offender, and the supply, the court machinery to meet it. It is not proposed to deal with the first, but the second. The separation of substantive and adjective law throws an interesting sidelight on court procedure. At first sight they seem to be inextricably mixed and the law used in finding out what happened often overshadows the real or substantive law.

There is a subtle humor in calling the law of procedure adjective or modifying. It is as though one were saying that possibly the adjective law might modify or materially change the substantive law. This may account for the reason that the courts are credited with not doing justice. It may be that they are more occupied in modifying than in applying the real law.

Substantial justice should be the same as the actual law, and actual law is the expression of the common sense of the community. This common sense is continually changing with changing conditions. If courts of justice were readily adjustable to social conditions, there would be no complaint about the courts. But the point of difference between substantial justice as applied in the courts and the common sense of the community, is the question of procedure. The courts in applying common sense to particular facts have necessarily formu-

lated rules and methods of application. By the time these rules are successfully working the substantive laws themselves have often changed, and the method of procedure has become in the meanwhile ill-adapted. Thus always are they one step behind the common sense or justice of the community.

When new conditions arise in manufacture—a new style of goods, new demands, change in labor or the invention of new machinery—the factory that has been working for years on the same basis must be radically changed and new methods adopted. Much of the machinery must be sent to the scrap heap. Manufactured goods are thrown away and new ones made according to modern market demands. Courts, in the administration of modern justice, are nothing after all but government factories.

All talk about respect for courts and the dignity of the bench may be a trifle overdrawn, and in a civilized democracy seems a little like the talk about "The Divine Right of Kings." In every other condition of life, a false importance of office is smiled at. In this age of frankness we do not expect such dignity of demeanor from anyone, except from the courts and judges. The President of the United States may go every day in the week to play golf or to attend a ball game, but no judge of the Supreme Court could frequently sit in the bleachers with popular approval. As a matter of fact, why should not the justice of the Supreme Court be as simple on the bench as he wants to be in private life?

Is there not a grave question in presuming too much as to this divine right of courts? What does the dignity of courts amount to? Is it necessary to impress the populace? Do pomp and formality increase the respect for authority? The respect does not come from uniforms or knee breeches. If it did, the car conductor and liveried flunkey were entitled to more.

There is undoubtedly a real respect and admiration for the courts, perhaps an innate feeling for abstract justice, but it is questionable whether it is more than respect for ultimate authority. The courts represent the concrete idea of supreme and final determination. "Unless there were courts," says the man on the street, "justice would be sought with a knife." Disputes must be settled and criminals punished, so apparently courts are necessary evils existing to satisfy the unlawful. A place and opportunity to fight seem also to be the demand, as though not so much justice were

demanded as that very arena for battle. This may explain the popular appeal of the courts and why there is supposed to be a romance or drama therein. Perhaps the public interest is not founded so much on the allurement of battle as on the interest of human character therein developed.

In the criminal courts, the method of arriving at justice in the form of a legal battle is not a very high ideal. It is supposed to be a fair fight between the criminal on the one hand and the state on the other, with the judge as the arbiter and the jury as the restraining influence protecting the public right. Although it is supposed to be a fair fight with even chances on each side, it is not so in reality. It is rather a miserable picture to imagine a criminal as fighting for his life. Corner a rat and of course he will fight somewhat. A criminal caught in the trap of the law cannot have a fair fight if the court is considered as giving him only an opportunity for a fair struggle. It is true that the criminal may employ counsel, if he can afford to pay. If he cannot afford to pay, the court will appoint one for him and he is supposed to be thankful to the judge even for an inexperienced and unoccupied legal champion.

Actually, what chance has he? The idea that a criminal trial is one great, grand battle between the state and its prosecuting attorney with enormous resources of wealth, power, etc., and the criminal, is absurd. The criminal has no money; his name is already besmirched; his lawyer is apt to have had little experience or be of doubtful reputation. He has little opportunity of discovering or securing witnesses, and no corps of detectives, legal service or assistance.

The very presumption of law is inconsistent. Under the English law the criminal is presumed to be innocent until he is proved guilty, and the odds are theoretically in his favor. He must be proved guilty beyond a reasonable doubt. So the law states, but in reality the chances are not even equal but are against the criminal. The fact that he has been indicted already prejudges him as guilty in the mind of the community. The judge, the jury and the public at large presume him to be guilty. They ask, "If he did not commit the crime, how did he come to be in court?" Everyone knows that the grand jury that has indicted him is composed of eminent citizens. The district attorney who caused his indictment was only elected last fall by large popular vote. It is impossible to

believe that he would try to railroad him to jail or be persecuting an innocent man. The fact of the matter is, the man is probably guilty, and what the judge and jury are there for is to make sure. The presumption of public opinion in spite of the presumption of law has almost convicted the criminal before he begins his supposed fair fight in court.

In a civil action, the inconsistency of court procedure is not quite so obvious; the two sides are arrayed one against the other, the judge is placed as umpire and accorded a quantity of circumstance. He is supposed to be endowed with an almost inhuman aloofness. The jury, often unwilling umpires, sit by to see that justice is done. Although willing to do their duty, they are anxious to be through with an inconvenient call of citizenship. They are not the best possible cojudges. The lawyers are opposed to one another as armed and paid contestants. The clients ill at ease are not particularly pleased at the many delays and technicalities of the trial. The witnesses, having been harrassed and confused, instead of being disinterested bearers of the truth may become unwilling and annoyed partisans.

During the trial or struggle the little technicalities, motions and exceptions bear a great similitude to a legal battle or an intellectual game. When the testimony is over, the two lawyers exhibit before the clients and jury their fighting capacity in words. Then the judge gravely charges the jury that it has been a fair battle, and that on the one side so many blows have been struck and on the other such and such counterattacks have been effective. After it is over and the battle ended, the jury go behind locked doors, pull out their pipes or cigars, forget about the ordeal and try to settle the matter on a business basis. The verdict may not always be according to law, especially that strict application of law as laid down by the judge, but the jury make allowance for the technicalities and anomalies of the trial and their decision is based on common sense.

The entire relation of courts to the community is not well adjusted in form or in the theories of trials. They are survivals of usages called forth by the economic conditions of a past age. When commercial and social life was on a simpler basis, and the courts occupied the position in the political structure as bulwarks for the protection of popular rights against tyranny and oppression "trial by one's peers," "due process of law," "the right of trial by jury,"

were noble phrases. There may be a question as to their present-day value. In a democracy are they more than sentimental?

The courts as instruments for the preservation of liberty are somewhat inept, and they are not any longer the necessary guardians of public freedom. Take away this quality of the overdrawn majesty of courts and there are removed many of the characteristics which awaken criticism. The majesty of the law and the form and state of the judiciary are antiquated ideas. Law may be the ultimate authority, but the courts which enforce it do not need stage costumes or setting. It is a question whether the power of the law is increased by the state and circumstance of courts. Perhaps in the police court, the small offender should be taught to shiver before the majesty of the law, but why, in civil court, should the client and witnesses be overcome with fright?

Hearings of the court are properly public; but why insist on this as a protection of public civil rights? It is no longer necessary and the physical conditions are not well adapted. The judge and the witness are far removed from the audience. Only scraps of testimony can be heard. In the present day of the ubiquitous reporter, there is little danger of star chamber proceedings.

As a painter seeking a landscape walks over the countryside and suddenly stops, spreads his legs, bends down and looks between them at the picture upside down, so new values may be obtained from an inverted point of view. Suppose the parties were brought into court with no funereal formality, but by being told to come over the telephone or by a postal card or any other method which satisfied the court they had been notified. When the parties or clients came there might be this important difference between the future courts and those of the present day. The clients and their witnesses would be the important people and to be considered first rather than the judges, the jury or the lawyers.

The clients have come to court because they want something settled. They are the people for whom the courts exist, not the judge, the jury, the court attendants or the lawyers. They are entitled to every courtesy and consideration, for it is primarily their court. They ought to be made comfortable and easy. Everything should be done to definitely settle their disputes. The law and majesty of court procedure are only incidentals. The immense

machinery of the law, although wonderful and complex, is only to make a definite product for the clients.

The clients' witnesses need to be considered as justice depends upon ascertaining facts, and their testimony should be elicited in the smoothest, gentlest and most thankful manner. If necessary a taxi should be sent for the witnesses. Their time and convenience should be consulted. The court asks their help and it is only reasonable to treat them with courtesy. When day labor is paid at $3 why should witnesses receive only fifty cents? The least that could be done is that the court will be responsive to their kindness. If witnesses are regarded as partisans for one side or the other in a great legal battle, the present system is advisable, and each side will continue to pay the witness outside the court.

Then the case would be turned over to the pleading or issue experts, corresponding to the English pronotary. In any large business corporation, daily problems and conditions have to be met and the first proceeding is to arrive at the exact question to be decided. It is hard to find a more absurd method of discovering the limits of a problem than by the common law or modern pleading. One side or the other often insists, because they believe they may have a possible chance of winning on a fluke or a misplay. If the matter were thoroughly sifted and defined by the judge or some judicial pleading officer or Master under him, the issues when they finally came to be tried would be clear cut. The actual time of the trial would be shortened. This forming of issues should be distinctly a court proceeding. Theoretically it is so now; the lawyer in issuing summons or drawing and serving the pleadings often acts as an officer of the court, which by the clerk sets the stamp of approval on his acts. Yet actually they are not court proceedings, but are merely phases of a legal game.

In the courts of the future, there will be no written pleadings; so far as the clients go all that should be necessary is to write a letter or send to the other side a bill. The real pleading will be arranged by the courts; judicial officers will investigate the facts and frame the issues. The object of the present-day pleading seems to be to tell as little about the case as possible. Framed in technical language their aim is only to make out a "cause of action," which will give them a standing in court without stating enough to give away their case to the other side. In other words, pleadings are

often cloaks or suits of armor which disguise the real issue, or like the matador's red cloak, serve to infuriate the opposing bull. It is shown by the frequent refusal to give any further information, and the appeals from orders for bills of particulars, or orders to make more definite and certain, or from demurrers. It seems necesary for the present-day lawyer to deal in wary words and forms that are over grave.

Suppose that the function of the lawyer in this respect were taken over by the court, the pleadings would have two objects: one to apprise the other side as to what the facts were in dispute, and secondly, to frame the issues clearly before the tribunal. At present the first object is not usually accomplished. It is easier to answer by denying all, and it is a better policy to do so. A trial would seem to be a free-for-all fight. The skilled lawyer says it is as easy to fight about all matters as about one or two particular matters, and if the plaintiff be compelled to prove a great deal, he may become so exhausted when he reaches an essential issue, he will fail. If, however, the court assumes the direction of pleading as it practically does in some courts of the country, there would be less danger of surprise. The court could practically say: "Now on this issue are you seriously going to dispute the fact? As a reasonable man, are you denying it?" If he answers "Perhaps it is so, but, let the other side prove it," it ought to be possible for the court to throw his technical objections out of the window.

Again if the definition of issues were distinctly a court rather than a partisan proceeding there would not be so much floundering about before trial. In modern legislative bodies there is usually a bill-drafting department where legislation may be put in legal and technical form. So in courts should there be Masters or at least trained clerks whose duties would be to frame issues.

The preparation would proceed not in the usual haphazard way. The evidence would not be procured or produced in court according to the financial ability of the client. If it be once admitted that the public should bear the expense of private suits, it is reasonable that the public should also assume all costs for a final determination in the best possible manner. If the court really wants the truth, let it be obtained by a trained corps of investigators.

The judge occupies a position so high that he is supposed to be virtuous and elevated to the last degree, so that the temptation is for him to become inhuman or non-human. Often because he has

a larger perspective and a wholesome contempt for the procedure, he obtains a truer point of view. Although he does not accept his position in a spirit of resignation, yet he makes the best of the formalism of court procedure.

His position would be more reasonable if the courts were reconstituted, as "justice factories." He would not find himself as the representative head of a business for which he is apparently though not actually responsible.

With the jury to decide the law in the case, and the judge to determine the facts there might also be justice. The laws being only crystallized common sense it might be that no one would be better able to enforce them than twelve average men. The present function of the jury to determine facts through testimony is hardly the best method. First, they are not accustomed to ascertaining facts. They have not heard a great quantity of witnesses, and they are not experts in perjury. Secondly, they are not accustomed to weighing one bit of evidence against the other. Their minds have not been trained either to remember all the evidence or for a logical discrimination as to its importance. They are apt to assume some parts as of undue importance and others as having little bearing.

Were the judge to ascertain the facts, at least there would be an expert. Technically the prisoner might be guilty of a crime. The judge would find all the facts, but the jury would take into account the extenuating circumstances, the prisoner's youth, the possibility that his life might be ruined by imprisonment, and would pronounce sentence accordingly. Practically that is what happens. In an accident case the jury takes into account the plaintiff's lawyer's bill, if they award any damages. Most verdicts are rendered in modern courts on this line. The jury has sworn to weigh the evidence and only decide according to the law as laid down by the judge. They usually apply the law of common sense and decide the facts according to the judgment that they know will be rendered.

The imaginative genius who will formulate a system of courts and of court procedure to meet modern conditions will answer one of the grave questions of the age. The superman, realizing the inadequacy of the survival of an ancient ordeal by battle as a means of arriving at truth, will devise a machinery and organization that will change the courts into places of impartial investigation.

With the judge and the court freed from technicalities, they

may engage detectives, investigators, official experts or use any means available to determine facts or law. They would then no longer present the picture of quiet spectators at a contest when they should be the active means of a judicial investigation. Is this Utopia? Then would I be a citizen thereof.

ADMINISTRATION OF BUSINESS AND DISCIPLINE BY THE COURTS

By Julius Henry Cohen,

Chairman, Committee on Unlawful Practice of the Law, New York County Lawyers' Association; Author of *The Law—Business or Profession?* and Member of the Group for the Study of Professional Problems.

In a *Memorandum on the Report of the Board of Statutory Consolidation on the Simplification of Civil Practice in the State of New York*, submitted to the legislature of the state of New York by the Lawyers' Group for the Study of Professional Problems, the importance of radical change in the administration of justice was emphasized and at least a dozen points thoroughly canvassed. This paper will be devoted to the consideration of but two of the points covered in the memorandum.

A. The Necessity for Effective Control of the Business of the Court

The draft of a proposed Judiciary Article for the Constitution of the state of New York, prepared by the same group and presented to the Constitutional Convention of 1915, contained the following:

> Section 4. The administrative business of the court shall be conducted by a board of assignment and control composed of the chief justice and the presiding justices of the several divisions of intermediate appeal. Every power adequate to that end is conferred upon it. It shall promulgate rules for conducting the judicial business of the court, and common forms for use therein. In the absence of action by the legislature it may prescribe rules of evidence. It shall from time to time prescribe the terms and parts of the court, define the jurisdiction of the divisions and parts, and assign justices to service therein.

The theory of this provision is that "We should apply to our (judicial) machinery the ordinary tests of efficiency that men apply in the business field. Does the thing work with the least waste of motion, and if it does not, where can motion be saved?" [1]

In every business enterprise authority for supervising the administration of the business is centered somewhere. The details of organized management—executive and factory—such as

[1] *Memorandum*, p. 5.

routing of the work, are designed by modern efficiency engineers with the purpose in view of economizing motion, of avoiding duplication of effort, and of concentrating energy in those places when and where it is most required. In such public quasi-judicial bodies as interstate commerce commissions, public service commissions, workmen's compensation commissions and the like, the chairman or the secretary is usually the administrative head and arranges things precisely as in a large business enterprise the manager arranges the organization machinery so as to dispose of the business with the least possible waste of time and energy. The signatories to the memorandum submitted to the legislature expressed the belief that in New York state the machinery for the administration of justice was "as archaic a vehicle as the stage coach, and as wasteful as pumping water by hand" and urged that the legal profession "be awakened from its drowsy contentment and . . . . apply its genius to the betterment of its own working machinery." [2]

There is some difference in detail between the plan proposed by this group and the plan outlined by the American Judicature Society. In the latter plan the administrative business of the court is to be in the hands of the chief justice, a procedure successfully put in practice by the Municipal Court in Chicago. In the Group's plan the administrative business is entrusted to a judicial board, rather than to a single individual. In so large a state as New York, with a different local problem for each judicial department, it seemed wiser to vest such administrative power in a board composed of the chief justice of the court of highest resort and the presiding justices of the several divisions of intermediate appeal. But whether the Chicago or the New York method be applied, is there any doubt of the soundness of the principle that responsibility and power for operating judicial machinery should be centered in a single executive authority?

B. THE EXERCISE OF DISCIPLINARY POWERS BY THE COURT

Section 9 of the proposed Judiciary Article provided:

> The justices of the court shall annually elect a committee of discipline composed of five justices and two members of the bar who shall have been admitted

[2] *Memorandum*, p. 5.

for at least fifteen years. The committee shall maintain discipline among the justices of the court, the official staff of the court, and the members of the bar, and shall promulgate canons of ethics for the court and bar. It shall have authority, after due hearing, to give reproofs, publicly or privately, impose fines, suspend any member of the official staff from office and any member of the bar from practice, to recommend to the board of assignment and control the removal from office of any justice or member of the official staff, and to disbar any member of the bar.

This provision was described by the signatories of the memorandum as "the most important of all the recommendations of this draft." The significance of this proposal lies in the power it would vest in a committee, consisting of justices of the court and members of the bar, of disciplining members of the court, as well as members of the bar. At the present time, the machinery of the court for disciplining lawyers is set in motion by the bar through associations of lawyers maintaining grievance and discipline committees. These associations, at great expense, maintain investigatorial departments, pay attorneys, and, in addition, draft members of the bar for the trial and prosecution of cases. Indeed, the courts have come to depend almost entirely upon the operation of this extra-judicial auxiliary. In the First Department nearly all of the disciplinary cases brought against members of the bar are conducted either by the Association of the Bar of the city of New York or the New York County Lawyers' Association.[3] If the duty of disciplining lawyers rests upon the bar, why should not the expense of the service be borne by the entire bar? Why should it be borne only by those who chance to be members of the association undertaking and performing the service?

The work of disciplining lawyers—at least in New York—is now efficiently performed. But the importance of providing some method by which complaints against members of the judiciary may be heard and considered has not yet been realized either by the bar or by the laity. It is a serious thing for a single lawyer to make complaint against a judge, and, as the members of the Group say, "Legislative supervision through the process of impeachment and removal has proved an insufficient corrective."[4] In an article

[3] For an analysis of the expense and time consumed, see chapter I, *The Law—Business or Profession?* by the writer.

[4] *Memorandum*, p. 27.

on "Disbarment in New York,"[5] Mr. Charles A. Boston calls attention to an early decision in New York, which holds that it is ground for disbarment to tell a judge to his face that he has rendered a corrupt decision and to reiterate it to an appellate court, with the statement that you are ready to prove it.[6] And Mr. Boston adds:

> In these democratic days, notwithstanding our constitutionally protected freedom of speech, a courageous lawyer, in the presence of a New York court or judge, whom he suspects, believes or knows to be open to criticism for subverting the ends of justice has not the same freedom of action, which once the prophet Nathan dared to exhibit before an absolute King of the Jews.[7]

On the other hand, the Federal Circuit Court of Appeals, in *Thatcher* v. *United States* (212 Fed. Rep. 801, at p. 807), held that where a judge is a candidate for reëlection, his qualifications may be

[5] Paper presented at the Thirty-sixth Annual Meeting of the New York State Bar Association, 1913. See *Thirty-sixth Annual Report of the Proceedings of the Association.*

[6] Matter of Murray, 11 N. Y. Supp., 336, G. T. Supr. Ct., 1st Dept., 1890, reported without opinion, 58 Hun. 604.

[7] Mr. Boston, further said:

Bible reading has not so long ceased to be a practice, that some of you will not recall the fable in which Nathan addressed King David. I, for one, hope that in the scrutiny which the courts are now undergoing, the judicial idea of the essential dignity of a court will be so modified that a lawyer may in some way lawfully read to an unjust judge, when necessary, a rebuke as telling as was Nathan's to David. You will recall that Nathan told to David the parable of the rich man and the poor man, the latter of whom had nothing save one little ewe lamb which he bought and nourished up, though the rich man had exceeding many flocks and herds; yet a traveller came to the rich man, for whom the rich man took the poor man's lamb, and dressed it for the man that was come to him.

"And David's anger was greatly kindled against the man; and he said to Nathan, as the Lord liveth, the man that hath done this thing shall surely die. And he shall restore the lamb fourfold, because he did this thing, and because he has no pity.

"And Nathan said to David, *thou art the man.*" (II Samuel XII: 5, 7.)

And then Nathan having explained the application of the parable to David's conduct in procuring the death of Uriah the Hittite, and marrying his widow, the great King David said unto Nathan:

"I have sinned against the Lord." (*Ib.*, 13.)

And I find that Nathan, instead of being disbarred, as he would have been if a New York lawyer, as utterly unfit to participate thereafter in the administration of justice, was actually summoned by David in his declining years, to anoint his son Solomon, the fruit of this condemned union, King over Israel. (I Kings 1: 34.)

freely discussed and summarily decided, and that a citizen does not "lose this right to criticize because he is a lawyer." Nor is his cricitism confined to what is " 'decent and respectful.' His criticism may be as indecent and disrespectful as the facts justify." Yet in that case the respondent attorney was disbarred because his criticisms, in the opinion of the court, went too far. It is true "that an attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court, and it is therefore his duty to uphold its honor and dignity." [8] The privilege of the lawyer to criticize the ruling and conduct of courts carries with it "the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending."[8] And this applies even to a justice of the peace, who is "*pro hac vice* the representative of the law, as fully as the chief justice of the United States in the most important case pending before him."[8] If, then, the lawyer must maintain respect for the court and uphold its dignity, how shall he perform this duty when its performance involves justifiable and sound criticism of a judge's conduct?

In the administration of the Municipal Court of Chicago, by virtue of his office, the presiding justice, upon the complaints of lawyers who had real grievances, took to task one of the judges of the court and summarily disciplined him by removal to another district from the one in which he had been acting. Such a committee on discipline as is suggested in the draft Judiciary Article, made up of five justices and two members of the bar who have been practicing law for at least fifteen years, would be primarily charged with the duty of maintaining the respect and dignity of the court, and members of the bar would be protected in submitting to such a committee evidence of actual dereliction on the part of the court.

Whatever rules the courts adopt, whatever the system of jurisprudence, the administration of the law is in the hands of the judges. An efficient system for the administration of the law must, therefore, necessarily provide for a more modern and scientific distribution of the work of the judges and a more comprehensive exercise of disciplinary power. I have not dwelt in this article

[8] Matter of Pryor, an Attorney-at-Law. Supreme Court of Kansas, 1877. 18 Kan. 72, 26 Am. Rep. 747. Per Brewer, J.

upon other features of the proposed Judiciary Article. These *two* proposals, however, justify emphasis. The one relates to the *selection* and *distribution* of available judicial energy. The other relates to the enforcement of high ethical standards by both bench and bar through adequate disciplinary machinery.

THE ORGANIZATION OF THE COURTS

By George W. Alger.

Law reform, in certain aspects, has made great progress in the United States in recent years. The advance has been uneven, however, and one of the principal subjects of necessary law reform remains substantially untouched. That is the reform of court organization.

There is no occasion for being discouraged. There are reasons why this essential reform has lagged behind others and when we consider the progress in other lines, we have great reason for satisfaction. If one goes back not more than ten years in a review of the reforms which have taken place in the decade, we will find that on the matter of eliminating technicalities a revolution has taken place in most of our states. The sacredness of the unessential no longer continues. The technical rulings on evidence, the unending line of reversed cases upon rulings upon mere questions of admissibility of particular questions have largely disappeared. The criminal law is far less technical in most of our states. There are a few states, to be sure, where the exchequer heresy of 1830 has not given place to the orthodox English rule that an erroneous admission or rejection of a piece of evidence is not ground for setting aside the verdict and ordering a new trial, unless, upon all the evidence it appears to the judges that the truth has not been reached. But these states are very few; state after state has adopted by statute the old English rule long ago reasserted in England in the Judicature Act of 1875 and perfected by the statute of 1883. Even in states where no statute on this score has been enacted, the courts have themselves fallen in line with the modern spirit of revolt against meticulous technicality. Criminal law has rid itself in America of a substantial part of the blot of erudite uncertainty which gave palliation, almost excuse, for lawlessness and lynch law.

Procedural reform continues to receive in all progressive American states a painstaking attention from the bar which it did not receive prior to the last decade. This work is very difficult. I am inclined to think that the concentration of attention which has

been devoted to reform of procedure by leading members of the bar and bench is a substantial reason why so little progress has been made in the reorganization of the courts themselves. Procedural reform, while enormously important, has dealt largely with matters of detail and highly professional details at that. I am not clear, in my own mind, as to whether it might not have been better in the long run if the question of judicial organization had been the reform measure taken up first. I am inclined to think that we would have made more progress.

I do not wish for a moment to seem to minimize the importance of procedural reform. I fully appreciate it. It is a type of reform which involves an enormous amount of hard, thankless labor from lawyers who love their profession enough to drudge for it. The point I wish to make, however, is this. On the matter of court organization, we should have behind us in our efforts a very considerable body of public opinion, capable of immense assistance in accomplishing the reorganization of the courts. We cannot, on the other hand, expect the layman to be directly and personally interested in the more technical questions of procedural reform. It is a professional and expert matter. It is more or less intricate. It involves questions of good mechanics—the mechanics of justice—questions of jurisdiction, the proper limitation of appeals, the elaboration of practice rules. The layman has of course quite properly assumed an attitude toward these matters, which most of us, unskilled in mechanics, would assume with reference to the movement of a complicated engine. We know the function which the engine is supposed to perform; we know that some engines are better than others, but we do not pretend to know why. We leave it to the engineers who study, devise and build them. We judge them only by what we learn of their results.

Now the disappearance of the technical spirit—noticeable in our criminal law and to an almost equal extent in our civil law—is due, I think, very largely to the demand of the layman. That happens to be a subject on which he need not stand puzzled before a strange machine. It is a subject on which he is qualified to have and to express an opinion and to make that opinion felt. In this matter of the reorganization of the courts, we would not lose sight of the fact that we are again dealing with a subject on which the layman's opinion is important and on which his opinion should be asked.

When we lawyers are able to make clear to the layman that we are endeavoring to solve in connection with the courts a problem of business organization, we will get his attention, his criticism and his valuable and essential support.

What is the matter with the business organization of our courts? I think the summary is accurate and complete which is contained in the report of the National Economic League on *Efficiency in the Administration of Justice*. The report says:

> Three circumstances determined our present American judicial organization: (1) the organization of the English courts at the Revolution; (2) the need of a rapid making-over of English common law and legislation into a common law for America in a period when little could be achieved in such a field by legislation and when the courts alone could be looked to; (3) the demand for the decentralization of the administration of justice and bringing justice to every man's door in the rural American community of the first half of the last century. The result was a system of separate courts, with a fixed staff, not available in any other tribunal, no matter how great the arrears in one or the lack of business in another, a setting-up of a machine for developing the law by judicial decisions rather than for the adjudication of causes, and a system of specialized local courts instead of specialist judges.

I shall not in this paper attempt to project a plan for a perfect court organization; I do not think it is possible to make such a plan adapted to the needs of all our states. The nature of the plan would necessarily be dependent upon varying conditions. An agricultural state, with no large cities, doubtless requires a different organization from a state like New York containing the largest city in the world. There are, however, I think, certain requirements applicable to any state. I endeavored some years ago to express these requirements in business terms, as follows:

> Any business man would say that for the effective operation of a growing business on a large scale, an adequate business organization is essential. Such an adequate organization includes at least an officer or group of officers having power to produce coördination in its various parts and a conscious general plan governing their action; second, a system by which the work done in various branches is carefully checked up so that responsible supervising officers and directors may know what is done and not done and who is entitled to commendation or blame; third, a system by which the time and attention of expensive and important officers are devoted not to details, but to the more serious work of their department; fourth, a system by which through specialization certain officers may become expert in the performance of important work; fifth, a system by which the directors and officers placed in responsible authority are given power in proportion to their

responsibility and are not, for example, handicapped by multitudinous by-laws of stockholders who meet annually; sixth, a clear, intelligent and complete audit or report of proceedings made annually or oftener that the stockholders may know how the stewardship of the officers and directors has been conducted.

There is not a state in the United States whose judicial system can stand the test of these rules of business organization. The systems—so-called for lack of a better name—are still the products of history, an evolution of a study of Blackstone's organization of English courts, plus the demands of a rural community over half a century ago, plus a little patchwork. In England the administrative organization of the courts, quite unlike in many respects anything we are likely to adopt, represents nevertheless a good business organization. The Lord Chancellor is the head of the judicial organization. He has the power of appointing the judges in the Chancery division, Kings Bench division and the Probate, Divorce and Admiralty divisions. These departments or divisions, created by English law, in turn have their responsible administrative heads. There is a president for the Probate, Divorce and Admiralty division. A chief justice is the head of the Kings Bench division and the Lord Chancellor himself is the head of the Chancery division. The Chancellor is a responsible and authoritative administrative officer and supervises every judge, clerk, bailiff and employe in the entire judicial system.

With us, the judicial system, strictly speaking, and the administrative system of the courts are separate and distinct entities. American courts rarely have control over their own clerks. In this country, we have developed at least in our large cities an enormously expensive administrative system in our courts, so that the salary list of a clerical force is often greater than that of the judicial force. These administrative officers are, in the higher grades, often elected and in the lower grades when appointed are not appointed by the judiciary nor are they under judicial control. The report to the National Economic League, to which I referred, states that even in one of the best administered of our courts, one which has an actual administrative organization, the Chicago Municipal Court, the administrative and clerical work costs more for each case than the purely judicial. The same thing is true in New York City. Judge William L. Ransom, in a recent address, gave some interesting statistics on this subject. In analyzing the

cost of from eight to ten million dollars a year of the judicial system in New York City he says:

> This is not due primarily to the salaries of judges. For example, in the Boroughs of Manhattan and the Bronx, out of the total cost of the administration of justice in the Supreme Court only 22 per cent represents the salaries of the judges of that court. In other words, the salaries of the justices of the Supreme Court in the Boroughs of Manhattan and the Bronx are not quite $1,100,000, while the salaries of the clerical force are nearly $1,300,000, and in addition to that there is a salary list of nearly $700,000 per year for the attendants of the courts. On the civil side of the Supreme Court in the Boroughs of Manhattan and the Bronx, the salaries of the judges are $660,000 a year. The salaries of their clerks are $774,000. The salaries of their stenographers are about $290,000, and the salaries of their attendants are nearly $660,000. . . . There has been built up a great unorganized and unintegrated body of subordinates, the volume of whose annual salaries substantially exceeds the salaries of the judges themselves so that in every case that is tried—for example, the Supreme Court of this state, within this county or the county of the Bronx—it costs the people of the county more for the attendants and clerks than it does for the judge who presides over the trial.

A badly organized business is always wasteful. I quote these figures regarding the administrative system of the courts to illustrate this fact. Under the judiciary law of New York—a thing of shreds and patches—the judges themselves have nothing to do with the salaries of these attendants or employes, and still less to say about the necessity of employing them. A considerable percentage of these employes are unnecessary. They neither assist the judges nor the litigants in judicial business. With a unified Supreme Court in New York, with actual control over judicial functions and administrative functions exercised by the court itself, and the so-called judiciary law of the state relegated to the junk heap, we might expect, in place of unnecessary clerks and attendants and with the money saved by their elimination, masters corresponding to the thirty-two masters who now serve in the English courts to the very great expedition of judicial business. The great need for judicial organization is of course in the large cities. Life there is complex; judicial machinery must be made adequate for the demands made upon it. When we consider the total lack of organization of courts in New York City, it is a wonder that conditions are not much worse than they are. Consider the situation.

First, look at the civil side. We begin with the Municipal Court, in which the rights of the poor are heard and determined.

The court has no organization; it has a nominal chief justice, who has no powers of any substantial kind; it has clerks who are substantially independent of the judges and can be removed only on charges filed with the appellate division of the Supreme Court, and after a trial as cumbrous as an impeachment. Its judges are chosen by election in separate districts. Some districts invariably elect incompetent judges of a low character; others, men of excellent standing and professional attainment. To give the public the benefit of the mixture the judges rotate from district to district. Their jurisdiction is limited; the calendars in some districts are so crowded that litigants have to spend two or three days of attendance before they can hope to be heard. In other districts, there is comparatively little to do. Each judge runs his own court to suit himself. The court has power to make minor rules of little importance, its rule-making power being circumscribed both by the act under which the court is created and by the great complicated Code of Civil Procedure, which still perplexes New York lawyers.

The next court to be considered is one which though called the City Court of the City of New York, sits only in the Borough of Manhattan, and performs such functions as are elsewhere performed by the County Courts in other counties embraced within the city. There is no logical reason for its existence as a separate court. It has a nominal chief justice who has no adequate powers and the rule-making function of the court is like that of the Municipal Court.

From these two courts appeals run to the so-called appellate term of the Supreme Court. Printed cases must be prepared on City Court appeals, while a typewritten copy of the record will do for the Municipal Court appeals to the same Appellate Court, composed of three Supreme Court judges, who change from month to month—a most unsatisfactory Appellate Court.

In counties other than Manhattan and the Bronx, we have County Courts, even less unified than the Municipal or City Courts. From these courts, appeals for no logical reason run not to the appellate term, but to the regular appeal division of the Supreme Court, to which appeals from the Supreme Court itself go. The Supreme Court itself—the highest court of original jurisdiction—is the only court having original equity powers, composed of twenty-eight original judges, having no chief justice, no power to make its own rules to meet its own practical requirements and dependent

upon the appellate division of the Supreme Court for rules—in other words, the Appeal Court makes the rules for the Trial Court. Instead of the Supreme Court judges being relieved, as the English judges are, by having procedural matters handled by masters, the Supreme Court judges must pass upon between sixty and seventy thousand motions, applications for orders and the like annually. They must daily spend half an hour at least of judicial time calling calendars, passing upon excuses for unreadiness and the like. Each justice is expected to hold court as though no other branch of the court existed. The result is, for example, that far more jurors are summoned to the parts trying jury cases than can possibly be used, all of which would be unnecessary if jurors were called not to one of these parts but to the Supreme Court itself and parcelled out to the various parts of the courts as needed. These Supreme Court judges rotate; they try equity cases one month, negligence cases another, contract cases another, with an occasional transfer to the trial of criminal causes or to duty as appeal judges in the appellate term. There is no specialization of function and no attempt at making experts in chosen branches of the law.

When one considers the organization of our local courts, which I have only partially and roughly outlined, the necessity for reorganization becomes obvious. We need a judicial system. We have over-developed the notion of judicial independence. We need to supplement it by the creation of a responsibility, of the judge to an organization, of which as an individual he forms a part. Back of the recall of judges, there remains a crudely expressed idea—the creation of an external responsibility to the people as a whole because there is lacking an internal responsibility, that of the judges to a judicial organization capable of effectively directing and disciplining them.

With all the reforms which have been made and which are in contemplation over matters of procedure and the like, we shall never have a fully efficient judiciary in the metropolitan district of New York until we have a unified system of courts of broad original jurisdiction, with branches to meet the convenience of litigants, unless we have for that court a responsible head, not only of its judicial but of its administrative work as well, with adequate power to assign justices to their work in accordance with their capacities and special fitness, with authority to discipline and direct clerks

and employes and to determine what employes the judicial system requires and where their services are wanted. This court must not be bound hand and foot by the present complicated Code of Civil Procedure. It should have power to make necessary rules, having the effect of law on matters of practice. This court should have power to appoint masters, with functions corresponding largely to those busily engaged today in the English courts of justice, who can consider practice applications and motions which today require an entirely unnecessary amount of time from lawyers and judges, pass accounts and make such investigations as the court may direct.

Until we have made clear to the public the necessity for these structural reforms and until with the aid of an enlightened public opinion we have modernized the organization of our courts, we shall not have attained, in full measure, an effective method of administering justice, or have made any appreciable reduction in the cost of litigation, or in the cost to the taxpayer of the judicial system.

LOOKING FORWARD IN THE LAW

By Andrew Younger Wood,
Managing Editor, *The Recorder*, San Francisco, Cal.

The dearest desire of man and the greatest necessity of society is justice; that will be conceded, even by the unthinking. The means by which that justice has been obtained have, however, been a cause for criticism from immemorial times.

The thought of statesmen, the labor of jurists, the activities of lawyers and the hopes of litigants have been directed toward the solution of this great problem. How shall speedy justice be achieved? How shall men, under the law, best secure the rights guaranteed them by that law? The question is age old and is still unanswered, save in the striving of those who look toward the light and see visions of a day when social and economic justice shall prevail. Yet with all of the effort that has been made, little of real progress has been accomplished. Litigation drags and justice is delayed and thereby denied.

It is customary to criticize the lawyers for this condition, but as a matter of fact the most persistent advocates of simplified procedure are the lawyers. They, of all others, realize the hardships that litigants, and particularly poor litigants, suffer by reason of delay and have, therefore, bent their efforts to seeking not only relief but a remedy.

It is more difficult to persuade a legislator that procedural reforms or changes in the judicial system advocated by lawyers are desirable than it would be physically to put a camel through the eye of a needle. Yet practically all of the social and economic reforms in California in the past eight years were conceived, advocated and adopted by lawyers and with their active support and assistance. While lawyers have not hesitated to radically change social and economic laws, they have been content, as a rule, with endeavoring to adapt present machinery to the advancing needs of the times. Yet their outlook has been forward as the facts will show.

This condition is not peculiar to California but is general throughout the country. Everywhere the tendency is toward

expedition in litigation and a higher realization of the lawyer's obligation of service, and there is every reason to believe that the development will be in the direction of more radical reforms, not only in procedure, but in the machinery of judicial organization.

I. EFFORTS TOWARD PROCEDURAL REFORM AND JUDICIAL REORGANIZATION

In California the principal factors in the movement for procedural reform have been the state and local bar associations, particularly those of San Francisco and Los Angeles, and the Commonwealth Club of California, an organization for the study and discussion of civic problems, located at San Francisco.

These organizations made the first definite concerted effort for procedural reform, one of the most important accomplishments being an amendment to the Constitution providing that:

> No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.[1]

Many drastic reforms have been advocated, among which were the abolition of the demurrer and the motion to strike out, it being declared that such matters were usually injected for purposes of delay and could very well be discarded. The outcry from the legal profession against such a drastic change in the procedure was enough to turn a none-too-friendly legislature against the proposals and they were not accorded a hearing. It is only just to state that so many politico-social questions requiring new and drastic legislation were pending at the session referred to (1911) that few matters not programmed were considered.

The California Bar Association has been a strong factor in the movement for procedural reform and has succeeded in a measure in having some of its measures enacted into laws. It has succeeded in simplifying the practice as to new trial and appeal and has labored diligently, but frequently without success, because of the indifference and ignorance of successive legislatures as to the desirability of the reforms proposed. The results, however, so far as the

[1] Constitution of California, Sec. 4½, Art. VI.

elimination of delay, the expedition of business and the relief of congestion was concerned have not come up to expectations, particularly in the latter instance, where litigation has multiplied faster than facilities have been provided for handling it.

One of the most important movements for the simplification of practice was inaugurated by the California Bar Association in 1915 through the creation of a Special Section to report on the advisability of governing procedure by flexible rules of court instead of by rigid statutory enactments.

This committee, of which R. S. Gray of the San Francisco Bar was chairman, and Walter Perry Johnson, Percy V. Long and Garrett W. McEnerney of San Francisco, and Judge Lewis R. Works and Joseph P. Loeb of Los Angeles, composed the personnel, made an exhaustive study of the entire question and presented a comprehensive report, recommending that the making of procedural rules be transferred from the legislature to the Supreme Court.

Professor Roscoe Pound, Dean of the Harvard University Law School, came to California, and at the Monterey Convention of the California Bar Association, in 1916, gave a scholarly and logical exposition of the entire subject of the government by the courts of the procedure in matters before them. The convention after elaborate discussion endorsed the plan in principle.

The legislative extra session of 1916[2] had requested suggestions from the justices of the Supreme Court and district courts of appeal, from the judges of the superior courts, and from the state and local bar associations as to changes "necessary to prevent delay incident to litigation in this state." Acting upon this invitation the California Bar Association recommended the appointment of a joint committee of legislators and lawyers to consider measures "for the relief of the courts." Such a committee was created,[3] made up of the chairmen and members of the Senate and Assembly judiciary committees and certain prominent members of the bar, men of large business, ability and experience, and thoroughly representative of the profession.

The joint committee, or rather the lawyer members, met during the legislative recess and devoted a week to the discussion of twelve suggestions that crystallized out of a day's argument. These

[2] A. C. R. 2, Stats. 1916, p. 50.
[3] S. C. R. 11, Stats. 1917, Chap. 14.

suggestions were representative of the thought of the lawyers in attendance and were designed to furnish a method not only of temporary relief but of permanent relief from congestion and delay. At the risk of seeming tiresome, the suggestions are here appended:

1. That the original and appellate jurisdiction of the Supreme Court be limited to constitutional questions, construction of statutes and important public matters.
2. That the present method of reviewing decisions of the District Court of Appeal be retained, and upon granting a review, the review to be heard in the Supreme Court.
3. That two additional District Courts of Appeal be provided, making five in all.
4. That instead of providing two additional District Courts of Appeal, two judges be added to the present District Courts of Appeal, making five members instead of three, and that the courts have power to decide cases by a majority of the judges.
5. That an Appellate Court having jurisdiction of a cause, instead of remanding it to a lower court when judgment is reversed, shall proceed to fully hear and determine the cause and enter final judgment.
6. That superior judges be elected by districts, thereby reducing the number of superior judges in localities for the purpose of equalizing the work.
7. That rules of procedure be adopted by the Supreme Court, or the Supreme Court sitting with a commission, or in some manner which, when adopted, shall supersede the present provision in the Code of Civil Procedure.
8. That the absolute right of appeal be limited to certain cases; that in other cases appeal be granted upon petition.
9. That a commission or some person be vested with judicial supervision.
10. That the jurisdiction of the courts be made elastic, so that the legislature may, under limitations, change the jurisdiction or increase the number of Superior Courts or judges, District Courts of Appeal or judges.
11. That the legislature be given power to provide for justice courts, municipal courts and inferior courts, provide for their jurisdiction and have power to delegate to municipalities the creation of such courts.
12. That admission to practice be regulated.

Professor Orrin Kip McMurray, of the Department of Jurisprudence of the University of California, was insistent that no real relief could be secured by adding to the old system and advocated the creation of a "Unified Court" after the suggestions of the

American Judicature Society, presenting at the same time a minority report recommending the consolidation of the various inferior courts into one tribunal of enlarged jurisdiction, similar to the Municipal Court of Chicago, particularly in the more populous counties and municipalities.

These suggestions, while favorably received, were discarded, together with the suggestion that the jurisdiction of the courts should be more elastic and that the legislature should have power under limitations to change not only the number and jurisdiction of the superior courts, but should be able to increase the number and alter the jurisdiction of the district courts of appeal as well, as the committee did not deem it advisable to import into its recommendations anything drastic or apparently revolutionary.

The committee was largely influenced in its final recommendations by expediency and the necessity for suggesting only such things as the legislature would absorb. With the end in view of securing some measure of relief, at the same time suggesting a means by which judicial administration might be improved, the committee presented four suggestions:

That two additional District Courts of Appeal be provided, making five in all.

That the administration of justice be supervised by a commissioner to be appointed by the governor.

That procedure should be governed by rules of court instead of by legislative enactments; and

That the standards and requirements for admission to practice be raised in conformity with recommendations previously made by the California Bar Association.

Of these recommendations only two were enacted into law:

A constitutional amendment was proposed for submission to the people creating two additional Courts of Appeal; and

The Code of Civil Procedure was amended by taking from the law schools the privilege of having their graduates admitted to practice without examination and by slightly increasing the standards for admission.

This change as to admission of attorneys was not nearly so broad as the change deemed desirable by the California Bar Association, which insisted upon three years' study in a law school or office and the creation of a Board of Law Examiners so as to relieve the district courts of appeal of the necessity of conducting examinations of applicants for admission to practice.

The legislature, notwithstanding its unwillingness to accept the suggestions of the lawyers for procedural and other reforms, of its own volition submitted to the people of California a proposed constitutional amendment of potential possibilities more drastic than anything suggested by the bar, for it engrafts upon the fundamental law of this state in principle the provision concerning the courts embodied in the Federal Constitution.[4]

This amendment confers upon the legislature jurisdiction to create "by general law" "such other courts," other than the Supreme Court and the Senate sitting as a court of impeachment, as may seem desirable. And it further provides:

> Upon this section becoming effective the remaining provisions of this article other than section nineteen, whether adopted heretofore or contemporaneously herewith, shall become of the same force and effect as general laws and be subject to repeal or amendment by legislative act adopted pursuant hereto.[5]

It will be seen that this proposed amendment is practically a substitute for Article VI, the judiciary article of the Constitution as it now stands, and that it removes all of the present constitutional guarantees surrounding the judiciary.

Indicative of the fact that the bench and bar of California are no longer hopeful of being able to improve conditions and methods by amending the present law, and are prepared for rapid and sudden changes, both in judicial organization and in procedure, the following thoughtful statement of Mr. Justice Sloss of the Supreme Court of California at a luncheon of the Bar Association of San Francisco furnishes food for thought:

> Formerly at gatherings of lawyers it has been the practice to devote the addresses to extolling the nobility of the profession of the law. That habit is gradually changing and the lawyers are devoting their attention more and more to devising ways and means for improving the law and its administration, with the particular purpose of avoiding delay.
>
> This is clearly established by the proceedings of the California Bar Association. Many of the suggestions there made have been tried. New courts, more judges, the abolition of appeals from certain orders, the alternative method of appeal, the simplification of appeals in criminal cases, have all been resorted to in an effort to promote reform.
>
> In spite of these efforts the bar has not succeeded in accomplishing anything substantial. In ten years there has been a great increase in the number of judges,

[4] Constitution United States, Sec. 1, Art. III.

[5] Stats. 1917, Chap. 79.

but the increase has not resulted in a speedier administration of justice. The creation of the district courts of appeal has resulted in the hearing of many matters that would not otherwise have been heard, but the courts are as far behind today as ten years ago.

There must be some reason for this lack of activity, for the fact is that no appreciable progress has been made. Probably it has been a mistake to try and tinker with the old machine when as a matter of fact the state may need an entirely new machine.

The bar may well take a leaf out of the book of the nation's experience in the present crisis, when every source of potential efficiency in all walks of life is being developed to its fullest extent for service. We are becoming accustomed to radical changes. The government has overnight embarked upon the construction and operation of ships, in the control of the transportation of foodstuffs and munitions, and now it is proposed to devote millions to the purchase of wheat in order to bring about a more equitable distribution of food.

It does not require a prophetic mind to look forward to the mobilization of the medical and engineering professions under government direction. In view of that, what is to be done by the lawyers? They must establish a system more in accord with the needs of the times. I offer no speculative remedies; the only point that I desire to make in connection with such a situation is that we must go at reform in a far more radical, a larger and more constructive manner, if we expect to accomplish substantial results.

II. EDUCATIONAL REFORMS

Hand in hand with the effort to improve the administration of justice through the courts by simplifying court procedure and improving judicial methods, go efforts to improve the same by improving the standards and education of the bar.

These efforts are of two kinds, one representing the more radical thought of the profession which would reach its goal by reforming the organization and methods of the bar, and the other the more conservative element that seeks to create higher standards through better systems of education.

A typical instance of the first of these methods of reform is the suggestion first made by Mr. R. S. Gray of the San Francisco Bar in a monograph published in *The Recorder*, San Francisco, July 28, 1913, for the creation of an "official trial bar." Mr. Gray's proposition as phrased by himself was:

> That all trials in court should be conducted by members of a trial bar holding public office under civil service system (including efficiency bureau) and prohibited from accepting any private employment while holding such office.

Mr. Gray reasoned from the assumption that the average man seeking a lawyer employs one with a reputation for "bringing home

the bacon" without giving much thought to the methods employed or the short corners turned in doing so. The condition thus created gives certain lawyers more than they can possibly handle and leaves other and frequently just as able but less aggressive men with little or nothing to do.

The result is an inequality of occupation and emolument that is not compatible with the proper administration of justice and in the end is unfavorable to litigants as a class, for the concentration of the bulk of the legal business in the hands of the few causes delay and congestion in the courts with consequent loss of time and money.

To obviate this condition, Mr. Gray suggested that the client should not be permitted to engage his own lawyer, but that the names of trial lawyers who had passed a civil service examination, should be placed in a box similar to that used in drawing jurors, and a prospective litigant desiring legal assistance might go to the official having this box in charge and have him draw from it the name of a lawyer to try his case, the lawyer's fees to be paid out of the public treasury. This system would, according to Mr. Gray's reasoning, improve the character and quality of the bench, because it would remove the incentive from certain lawyers to endeavor to secure the elevation to judicial office of persons amenable to influence. All of the trial lawyers being on an equal footing as to clients the inducement to seek superserviceable judges would be gone.

The evil of commercialization being largely responsible for the present condition, Mr. Gray argued that the remedy was to "take the entire court work out of the control of the pocketbook," thereby improving and facilitating the administration of justice and increasing popular respect for the courts and the law.

This idea Mr. Gray elaborated in an address before the California Bar Association at San Diego in November, 1913, an address that subsequently appeared in the *Journal of Criminal Law and Criminology*, January, 1914, and also again before the Economic Club of San Francisco in a discussion of the question "Is There Any General Fundamental and Vital Defect in Our Present Administration of Justice?"

The fly in the ointment Mr. Gray found to be "commercialism" and "partizanship," and he argued for the removal of these im-

pediments or defects by the reorganization of the bar and the creation of an "official trial bar." Mr. Gray's criticism of the legal profession and his suggestion for its reformation did not meet with favor; indeed it created sharp antagonisms which, however, have since been removed to a large extent.

Early in its career as an influence for reform the California Bar Association endeavored to have the legislature increase the requirements and raise the standards for admission to the bar, adverted to above, by requiring the equivalent of a high school education, three years' study in a law school or office, the removal from the law schools of the privilege of having their students admitted to practice without examination; and the creation of a Board of Law Examiners charged with the examination of all applicants for admission to practice, so relieving the district courts of appeal for other and more important duties.

These recommendations were submitted to the legislature at four successive sessions and were each time refused enactment. At the 1917 session a bill was passed raising the requirements slightly and removing the law schools' "no examination" privilege; but the end sought of putting the education and training of lawyers on much the same plane as the training and examination of doctors, was not accomplished; however, it was a step in that direction.

At the 1914 convention of the California Bar Association at Oakland, a resolution was adopted committing the association to the education of lawyers after admission to the bar and suggesting to the local associations the advisability of providing means for such educational work.

The father of the resolution was Mr. Gray, who had been very successful in "visualizing practice" and "vitalizing decisions" in his work as an instructor at the Y. M. C. A. Law School. Under Mr. Gray's direction a "practice class" for education after admission was established at the Bar Association of San Francisco and conducted for upwards of two years with great benefit and satisfaction to those who attended.

Lack of interest on the part of the association and its Board of Governors in the development of the "practice class" work resulted in its abandonment as an association activity, but the work was continued independently and on a more comprehensive scale by the Bay District Inns of Court.

Another instrumentality that was expected to play a definite

and leading part in the education of the young lawyer before admission to the bar, was the Legal Aid Society, organized in San Francisco in May, 1916, but the society has not as yet measured up to the height of its possibilities in that regard. It had been expected that the Legal Aid Society, which in effect is a legal clinic, would stand in the same relation to the legal profession as does the hospital or free clinic to the medical fraternity, by providing means of practical education for the undergraduate.

The founders had in mind the success of such a movement in Minneapolis where the Legal Aid Society, working in conjunction with the bar association and the associated charities, provides the senior students of the University of Minnesota Law School with an opportunity for practical work in the handling of the cases of poor litigants who come to the society for redress of their wrongs. To that end the assistance and interest of the heads of the nearby law schools was enlisted in the organization of the Legal Aid Society, but as yet no steps have been taken to make the Legal Aid Society perform its logical function in an educational way.

Perhaps this will come in time—the society is a little over a year old—but it does seem as though a splendid opportunity for practical service to the legal profession as well as to the public is being neglected in not providing for student coöperation in this work on a scale that will be of practical benefit to embryo lawyers. Not that some use has not been made of law school students, but the work of practical instruction of students has not, as yet, been thoroughly coördinated with that of the society.

III. THE LAWYER'S OBLIGATION

It is axiomatic that the courts were made for the people and not the people for the courts. As lawyers are officers of the courts, it follows that, in every scheme for the improvement of the administration of justice, the improvement of the lawyer, ethically and educationally, plays a large part. In fact procedural reform, judicial organization and legal education are parts of a problem and must progress together. The lawyer is the vital element in all three phases, and the better fitted he is educationally to cope with the situation, the sooner will the problem be properly solved.

It follows then, as a natural corollary, that the bar, realising its function and its obligation to maintain the rights of the people and to uphold the law, must, if it would have its profession con-

tinue in its high estate, see to it that the neophytes are not only grounded in the fundamental principles of law, but that they should be furnished with the opportunity to apply those principles through the medium of undergraduate and postgraduate clinical work with the Legal Aid Society, work that will give them an insight into social conditions and problems, coupled, for graduate students, with a well-rounded educational course after admission that will develop their powers of reasoning and observation, and so fit them to undertake their life's vocation, not as fledgelings merely, but fully panoplied in the knowledge of their work and its meaning and of the obligations of service that should be the first consideration of "an officer of the court."

This obligation of service goes not only to legal education for the development of the profession, but to the organization of courts and their methods of work.

The education of the lawyer should be so directed that he will be able to shake off the *laissez faire* doctrine of older days and be willing to reform and even to "junk" judicial systems when they demonstrate their inability to cope with present conditions. The lawyer must be as ready as the captain of industry to discard old methods and old machinery for new ideas and processes that will fit the needs of the times.

It is not out of place in this connection to quote again from the talk of Mr. Justice Sloss, referred to above:

> Probably it has been a mistake to try to tinker with the old machine when as a matter of fact the state may need an entirely new machine. . . . . I offer no speculative remedies; the only point I desire to make in connection with such a situation is that we must go at reform in a far more radical, a larger and more constructive manner, if we expect to accomplish substantial results.

This appears to be the keynote—the crux of the whole situation; upon such a foundation only is progress built.

The problem is cognizable; the solution lies in so coördinating the activities of those who prepare, administer, interpret and apply the law, both in their preparation for that work and in the work itself, that we shall be able, with clear seeing eyes and determining minds to go forward toward better and greater things.

Will the older lawyers take the lead in finding the solution of the problem, or must appeal be made to Caesar, the young man in the law school, the sincere student of the law, both before and after his admission to practice, to come, to realize and to bring relief?

INDEX

Ex-PBF
10-6-17.